FULCRUM CAPITAL SDN BHD

v.

DATO' SAMSUDIN ABU HASSAN; RAHAZ SDN BHD & ANOR (INTERVENERS) & ANOTHER CASE (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NOS: S5-22-119-1998 & D4-22-3748-1998]
8 AUGUST 2001

CONTRACT: *Guarantee - Loan secured by charge and guarantee - Demand for payment - Whether there was binding agreement to rollover loan for another six months - Whether guarantor liable - Failure by guarantor to attend court and give evidence - Whether attracted invocation of s. 114(g) Evidence Act 1950 - Contracts Act 1950, s. 79*

On 9 October 1996, the plaintiff ('Fulcrum') granted a term loan of RM76,219,512 to one Rahaz Sdn Bhd ('Rahaz'). The loan, which was for a period of 12 months, was in separate tranches of RM62,500,000 and RM13,719,512 respectively, with the latter sum representing interest payable upfront to the plaintiff calculated at 18% per annum. Rahaz was unable to repay the loan within the stipulated period, and so negotiated for a six month extension and for a rollover of the loan. By letter dated 10 October 1997, Fulcrum agreed to grant the extension, on conditions that Rahaz pay RM14,344,512 within seven days thereof as settlement for: (i) the outstanding interest of RM13,719,512; and (ii) an extension fee of RM625,000. Rahaz did not make payments as per the request, but nonetheless paid Fulcrum RM1.5 million on 21 October 1997 and RM6.5 million on 18 November 1997. It was however Rahaz's stand that these payments were remitted to Fulcrum upon the latter agreeing to rollover the outstanding loan for a further six months, and withhold legal proceedings until then. Fulcrum denied that there was ever any such agreement, and on 4 December 1997 demanded payment of the outstanding sum, which then stood at RM102 million. Rahaz did not respond and Fulcrum hence instituted the present suit against the guarantor of the loan, one Dato' Samsudin, who was Rahaz's director and substantial shareholder.

At the trial, Fulcrum elicited evidence which showed that it had never agreed to rollover the loan, and had in fact registered strong official protest to Rahaz's suggestion as to the existence of such agreement. Dato' Samsudin however never took the witness stand, and consequently, notwithstanding that he had represented Rahaz in most of the negotiations with Fulcrum, evidence relating to the events were left to his subordinate ('Azahari') to explain. In the circumstances, before the learned judge, an issue arose as to whether the parties herein had agreed to rollover the loan for a period of six months expiring on 9 April 1998, and in any case, whether Dato' Samsudin was liable to pay the plaintiff the unpaid balance sum of the loan.

Held:

[1] There was no binding agreement reached to roll over the loan given by the plaintiff for a further period of six months expiring on 9 April 1998. The plaintiff has proved on the balance of probabilities that they had never agreed to extend or roll over the facility for a further period of six months. They had also proved that the relevant condition precedent had not been met by Rahaz, as would enable them to consider granting the extension. (p 440 f)

[2] Dato' Samsudin's refusal to attend court on the scheduled dates must attract the invocation of s. 114(g) of the Evidence Act 1950. Such refusal could be equated to a refusal to go to the witness box. (pp 442 b & 441 f)

[3] Although it was suggested that there was a telephone conversation between the Managing Director of Fulcrum and Dato' Samsudin on 17 November 1997 where it was said that an agreement for an extension of the loan was reached, Azahari, the sole defendant witness, in his evidence confirmed that he did not know who the Managing Director of Fulcrum was. In any case this point was not pleaded. And to compound matters, Dato' Samsudin had failed to attend court on the scheduled dates of hearing and so could not be cross examined on the point. (p 440 h)

[4] Rahaz's letter of 18 November 1997 alleging that there was an agreement to extend the loan for six months and withhold legal action in consideration of payment for RM6.5 million could not be true. The fact remains that there was no agreement whatsoever that was reached pertaining to the two issues of roll over and not taking legal action. The truth was, the term loan facility was in default after 9 October 1997 and Fulcrum was reserving the right to demand full payment. (p 371 c-f)

[5] The loan which had been disbursed on or about 10 October 1996 had become due and payable on or about 9 October 1997. There was default and Dato' Samsudin who gave a personal guarantee must now pay that loan to Fulcrum. Rahaz as the principal debtor was unable to repay the loan, and Dato' Samsudin who gave a personal guarantee must now be held accountable. (p 328 c)

[Preliminary issue decided for plaintiff.]

Case(s) referred to:

AEG Carapiet v. AY Derderian AIR [1961] Cal 359 ***(refd)***
Allaway v. Duncan [1867] 16 LT 264 ***(refd)***
Allied Pastoral Holdings Pty Ltd v. Commissioner of Taxation [1983] 1 NSWLR 1 ***(refd)***
Amys v. Barton [1912] 1 KB 40 ***(refd)***
Beare v. Garrod [1915] 113 LT 673 ***(refd)***
Beevis v. Dawson [1957] 1 QB 195 ***(refd)***
Brandon v. Smith [1853] 1 WR 130 ***(refd)***
Briscoe v. Briscoe [1968] P 501 ***(refd)***
Browne v. Dunn [1893] 6 R 67 ***(refd)***
Burrell v. Jones [1819] 3 B & Ald 47 ***(refd)***
Carter v. White [1883] 25 Ch D 666 ***(refd)***
Chilton v. Blair & Co Ltd [1914] 8 BWCC 1 ***(refd)***
China & South Sea Bank Ltd v. Tan [1989] 3 All ER 839 ***(refd)***

Coady v. J Lewis & Sons Ltd [1951] 3 DLR 845 ***(refd)***
Commercial Banking Co of Sydney Ltd v. Patrick Intermarine Acceptance Ltd (in liquidation) [1978] 52 ALJR 404 ***(refd)***
Crown Lumber Co Ltd v. Engel [1961] 28 DLR (2d) 762 ***(refd)***
Direct Acceptance Finance Ltd v. Cumberland Furnishings Pty Ltd [1965] NSWR 1504 ***(refd)***
D v. A & Co [1900] 1 Ch 484 ***(refd)***
Downman v. Williams [1845] 7 QB 103 ***(refd)***
Duncan Fox & Co v. North and South Wales Bank [1880] 6 App Cas 1 ***(refd)***
Ellis v. Wallsend District Hospital [1989] 17 NSWLR 553 ***(refd)***
Ewart v. Latta [1865] SC 36 ***(refd)***
Ex parte Clifton [1836] 5 Dowl 218 ***(refd)***
Ex parte Evans [1840] 4 Jur 991 ***(refd)***
Ex parte Watts [1832] 1 Dowl 512 ***(refd)***
Fulcrum Capital Sdn Bhd v. Dato' Samsudin Abu Hassan; Rahaz Sdn Bhd & Anor (Interveners) & Another Case [2001] 5 CLJ 73 HC ***(refd)***
Gilbey v. Great Western Railway Co [1910] 102 LT 202 ***(refd)***
Goulston Discount Ltd v. Clark [1967] 2 QB 493 ***(refd)***
Guild & Co v. Conrad [1894] 2 QB 885 ***(refd)***
Hall v. Ashurst [1833] 1 Cr & M 714 ***(refd)***
Hellings v. Jones [1825] 3 Bing 70 ***(refd)***
Iveson v. Conington [1823] I B & C 160 ***(refd)***
Jackson v. Digby [1854] 2 WR 540 ***(refd)***
Jamil Harun v. Yang Kamsiah Meor Rasdi & Anor [1984] 1 CLJ 215; [1984] 1 CLJ (Rep) 11 PC ***(refd)***
Jones v. National Coal Board [1957] 2 QB 55 ***(refd)***
Jowitt v. Callaghan [1938] 38 SR (NSW) 512 ***(refd)***
Lakeman v. Mountstephen [1874] LR 7 HL 17 ***(refd)***
Leedham v. Baxter [1856] 4 WR 241 ***(refd)***
Leong Hong Khie v. PP; Tan Gong Wai v. PP [1986] 2 MLJ 206 ***(refd)***
Lewis v. Nicholson [1852] 18 QB 503 ***(refd)***
Lim Ah Oh & Anor v. R [1950] MLJ 269 ***(refd)***
McLean v. Discount & Finance Ltd [1939] 64 CLR 312 ***(refd)***
Mechanical and General Inventions Co and Lehwess v. Austin and Austin Motor Co [1935] AC 346 ***(refd)***
Meek v. Fleming [1961] 2 QB 366 ***(refd)***
Morrison v. Barking Chemicals Co Ltd [1919] 2 Ch 325 ***(refd)***
Moschi v. Lep Air Services Ltd [1973] AC 331 ***(refd)***
Myers v. DPP [1965] AC 1001 ***(refd)***
Northfield v. Orton [1832] 1 Dowl 415 ***(refd)***
Paric v. John Holland Constructions Pty Ltd [1984] 2 NSWLR 505 ***(refd)***
PP v. Lee Pak [1937] MLJ 265 ***(refd)***
Queen's Case [1820] 2 Brod & B 284 ***(refd)***
R v. Abbey [1982] 138 DLR (3d) 202 ***(refd)***
R v. Bircham [1972] Crim LR 430 ***(refd)***
R v. Hart [1932] 23 Cr App R 202 ***(refd)***
R v. Sharp [1988] 1 All ER 65 ***(refd)***
R v. Summers [1986] 22 ACR 47 ***(refd)***
R v. Willis [1960] 1 All ER 331 ***(refd)***
Ratten v. The Queen [1972] AC 378 ***(refd)***
Re A Solicitor [1966] 3 All ER 52 ***(refd)***
Re An Attorney [1870] 22 LT 543 ***(refd)***
Re Bateman [1833] 2 Dowl 161 ***(refd)***

Re Bentley, ex p Bentley [1833] 2 Deac & Ch 578 ***(refd)***
Re Fairthorne [1846] 1 Saund & C 40 ***(refd)***
Re FC [1888] WN 77 ***(refd)***
Re Gee [1845] 2 Dow & L 997 ***(refd)***
Re Kearns [1847] 11 Jur 521 ***(refd)***
Re Pass [1887] 35 WR 410 ***(refd)***
Re Pichi Muthu [1970] 2 MLJ 143 ***(refd)***
Re Samuel v. Rhodes, ex p Samuel v. Isaacs [1838] 2 Jur 858 ***(refd)***
Re Webb [1845] 14 LJQB 244 ***(refd)***
Re Williams [1850] 12 Beav 510 ***(refd)***
Rondel v. Worsley [1969] 1 AC 191 ***(refd)***
Russel v. Reece [1847] 2 Car & Kir 669 ***(refd)***
Silver and Drake v. Baines [1971] 1 QB 396 ***(refd)***
Subramaniam v. PP [1956] 1 WLR 965 ***(refd)***
Thompson v. Gordon [1846] 15 M & W 610 ***(refd)***
United Mining and Finance Corpn Ltd v. Becher [1910] 2 KB 296 ***(refd)***
Vadivelu Thevar v. State of Madras AIR [1957] SC 614 ***(refd)***
Walker v. Arlett [1831] 1 Dowl 61) ***(refd)***
Watson v. Murrel [1824] I C & P 307 ***(refd)***
Wentworth v. Rogers [1984] 2 NSWLR 422 ***(refd)***
Western Credit Ltd v. Alberry [1964] 2 All ER 398 ***(refd)***
Western Dominion Investment Co v. MacMillan [1925] 2 DLR 442 ***(refd)***
Woodhouse v. Hall [1980] 72 Cr App Rep 39 ***(refd)***
Yeak Chie Chai v. Gan Bee Aik [1984] 1 MLJ 305 ***(refd)***

Legislation referred to:

Civil Law Act 1956, ss. 3, 5
Contracts Act 1950, s. 79
Evidence Act 1950, ss. 52, 60, 114(b), (g), 133, 133A, 134, 138, 148
Prevention of Corruption Act 1961, s. 4(b)
Rules of the High Court 1980, O. 42 r. 8(4)

Other source(s) referred to:

Halsbury's Laws of England, 4th edn, para 277
Jeffrey Pinsler, *Civil Procedure,* p 725
Sarkar on Evidence, 13th edn, 1990 Reprint, p 1049

(Civil Suit No: S5-22-119-1998)
For the plaintiff - M Pathmanathan (V Sivaparanjothi); M/s Sri Ram & Co
For the defendant & interveners - Lim Tuck Sun (Edmund Bon Tai Soon); M/s Chooi & Co

(Civil Suit No: D4-22-3748-1998)
For the plaintiff - M Pathmanathan (V Sivaparanjothi); M/s Sri Ram & Co
For the defendant - Lim Tuck Sun (Edmund Bon Tai Soon); M/s Chooi & Co

Reported by WA Sharif

JUDGMENT

Abdul Malik Ishak J:

Introduction

In civil suit no: S5-22-119-1998, Fulcrum Capital Sdn Bhd ("Fulcrum") was the plaintiff while the defendant was Dato' Samsudin Abu Hassan ("Dato' Samsudin") and Rahaz Sdn Bhd together with Redbridge Assets Ltd were added as interveners. It would be ideal to refer to civil suit no: S5-22-119-1998 as "the Samsudin Action".

In civil suit no: D4-3748-1998 which will henceforth be referred to as "the Rahaz Action", it was a tussle between Fulcrum as the plaintiff with Rahaz Sdn Bhd as the defendant.

On the directive of the Honourable Chief Judge of Malaya, the Samsudin Action was consolidated with the Rahaz Action.

In a separate judgment which has since been reported *vide Fulcrum Capital Sdn Bhd v. Dato' Samsudin Abu Hassan; Rahaz Sdn Bhd & Anor (Interveners) & Another Case* [2001] 5 CLJ 73 I have set out in extenso the facts of the case, the arguments of the parties in regard to several interesting and time consuming enclosures and I too made the following orders (see p. 135 of the CLJ reporting):

> By virtue of Order 33, rule 2 of the RHC, this court orders that the following issue of:
>
> > Whether there was a binding agreement reached between the parties to roll over the loan given by the plaintiff for a further period of six (6) months expiring on April 9, 1998?
>
> to be heard on 25, 26, 27, 28 and 29 September, 2000.

That separate judgment as alluded to above will be referred in this judgment from time to time.

Madam DR John who acted for the defendants in the Samsudin Action and the Rahaz Action agreed to the narrowing of the preliminary issue and that was indeed an act of benevolence on her part. In that separate judgment, I alluded to the concessions made by Madam DR John (see p. 129 at column b of the CLJ reporting):

> I agree to the narrowing of the preliminary issue as proposed by Mr. M. Pathmanathan.

Again, in that separate judgment, Madam DR John verbally conceded (see p. 129 at column e of the CLJ reporting):

> Madam DR John again relented and said:
>
> > I once again agree to the narrowing of the issue and to the issue proposed by Mr. M. Pathmanathan. I say that I agree that the narrowing down of the issue as framed by Pathma would decide the whole case once and for all, YA.

In the context of the concession by Madam DR John, that separate judgment contained the following germane passages (see p. 154 at columns e to f of the CLJ reporting):

Mr. M. Pathmanathan rightly submitted that:

> On 25 August 2000, I believe the record of the court will bear me out when DR John agreed that the preliminary issue is a valid and proper preliminary issue. However, she said that the same preliminary issue may be tried in November 2000. In the premises, it is not wrong to say that the order for the preliminary issue to be tried today until 29 September 2000 was by consent. The defendants have no objections in principle and their objections is as to the date of the trial of the preliminary issue scheduled today till 29 September 2000. In the premises, I submit that the defendants appeal is without merit and in bad faith and made solely to delay the trial and to scuttle today's hearing.

That separate judgment also carried the following passages (see p. 154 to p. 155 of the CLJ reporting):

Mr. M. Pathmanathan continued further in his submission and he said that:

> I verily believe that the notes of proceedings on 25 August 2000 would show that DR John agreed that if the preliminary issue is answered in the negative it would put paid to the defence ie, the counterclaim.

I have since perused through the notes of evidence recorded by me for the session on August 25, 2000 and I found the following recital of what Madam DR John had said:

> I too agree that if the preliminary issue is answered in the negative it would put paid to the defence ie, the counterclaim.

Surely the notes of evidence as recorded by this court reflect the reality of the matter. It was a verbatim recording of the oral submissions of the parties, a task which was arduous in the extreme.

The trial of the preliminary issue was not a short affair. It was protracted and it extended to twenty six (26) long lingering days.

The Trial Proper

I will now attempt to narrate the evidence as unfolded in the course of the trial.

Lum Sing Fai, the head of department of Fulcrum took the stand as Fulcrum's first witness. He testified that he started working with Fulcrum, a licensed moneylender exempted from the provisions of the Moneylenders Act 1951, in 1994. The gazette notification governing the exemption of Fulcrum from the provisions of the Moneylenders Act 1951 was identified by Lum Sing Fai at p. 1 of the plaintiff's bundle of documents marked as "A" (hereinafter referred to as bundle "A").

As the head of department of Fulcrum, Lum Sing Fai's powers were defined in the "standard operating procedure" manual (exh. "P2") issued by Fulcrum as seen at p. 141A of bundle "A". In fact, Lum Sing Fai testified that his job was merely as a head of department and the title that was accorded to him as an executive director was only a derived title. In 1996, Lum Sing Fai was the head of department carrying the title of a general manager and his powers were defined at p. 133 to p. 134 of bundle "A". Lum Sing Fai was quite categorical when he said that as the head of department he could not approve nor extend loan. To a question as to whether the list of duties and responsibilities as set out in the "standard operating procedure" manual were strictly adhered to in Fulcrum, Lum Sing Fai answered in the positive.

He has this to say: that throughout his six (6) years stint with Fulcrum, all the staff members strictly adhered to the "standard operating procedure" manual (exh. "P2"). In October 1996, Lum Sing Fai's immediate subordinate officers were:

(1) Loh Kam Chuin, the deputy head of department carrying the title of senior manager; and

(2) Yong Wing Kheong, holding the title of a manager.

and these two gentlemen continued to hold the same positions throughout the years in 1997 and 1998. Lum Sing Fai added a caveat when he said that Loh Kam Chuin was still holding the same position in 1997 and in 1998 whereas Yong Wing Kheong had left Fulcrum in the middle of 1998. These two gentlemen were not empowered to approve loans nor were they empowered to approve an extension of the loans and their powers and responsibilities were amply set out in the "standard operating procedure" manual (exh. "P2") in bundle "A".

Lum Sing Fai testified further and this was what he said:

(1) During his tenure as the head of department no one working in Fulcrum has ever exceeded their authority.

(2) The power to approve and extend loan in Fulcrum lies with the loan committee which comprises of:

(a) Soo Kim Wai,

(b) Jimmy Lim, and

(c) Tan Sri Dato' Azman Hashim.

(3) That Rahaz Sdn Bhd was a customer of Fulcrum since October 1997.

(4) That Rahaz Sdn Bhd approached Fulcrum in September 1996 for a loan.

(5) By letter dated 27 September 1996 Fulcrum offered Rahaz Sdn Bhd a term loan of RM76,219,512 and that letter can be seen in exh. "P3" and as reflected at p. 4 to p. 11 of bundle "A". At the last page of exh. "P3" and that would be at p. 11 of bundle "A", Rahaz Sdn Bhd acknowledged acceptance of the terms and conditions of the letter of offer.

(6) That Rahaz Sdn Bhd passed a resolution to accept the term loan facility of RM76,219,512 from Fulcrum pursuant to art. 90 of the Articles of Association of Rahaz Sdn Bhd as seen at exh. "P4" and as reflected at p. 12 to p. 13 of bundle "A".

(7) Basically, by way of a resolution, Rahaz Sdn Bhd resolved to accept the term loan facility of RM76,219,512 from Fulcrum subject to the terms and conditions as stipulated in the letter of offer dated 27 September 1996 as well as in all the loan and security documents.

that would be prepared by Fulcrum's solicitors upon the following securities (see "P4" as well as p. 12 of bundle "A"):

(i) First Party Pledge of 22,500,000 shares of Merbok Hilir Sdn Bhd (Company No. 321155 K) together with the duly executed blank transfer forms(s) in favour of the Lender and/or its nominees (exhibit P9, as well as at page 1 to page 13 of bundle 'B');

(ii) Third Party Pledge of 6,750,000 shares of Merbok Hilir Sdn Bhd (Company No. 321155 K) together with the duly executed blank transfer form(s) in favour of the Lender and/or its nominee(s) (exhibit P11, as well as at page 20 to page 33 of bundle 'B');

(iii) Third Party Pledge of 65,000,000 shares of SMG Holdings Limited (Company No. 87/03019/06), a company incorporated in the Republic of South Africa together with the duly executed blank transfer form(s) in favour of the Lender and/or its nominee(s) (exhibit P7, as well as at page 71 to page 84 of bundle 'A');

(iv) Pledge of the entire paid-up capital of Rahaz Sdn Bhd (Company No. 222838 V) together with the duly executed blank transfer form(s) in favour of the Lender and/or its nominee(s) (exhibit P13, as well as at page 40 to page 53 of bundle 'B' and exhibit P15 as well as at page 51 to page 64 of bundle 'A'); and

(v) Memorandum of Deposit and Power of Attorney in favour of the Lender to deal with the shares in (i), (ii), (iii) and (iv) above (exhibit P8, as well as at page 85 to page 90 of bundle 'A'); and

(vi) Personal Guarantee of Dato' Samsudin bin Abu Hassan (exhibit P6, as well as at page 14 to page 19 of bundle 'A').

(8) That in pursuance thereof, a Facility Agreement was entered into between Fulcrum and Rahaz Sdn Bhd on 9 October 1996 as seen in exh. "P5" as well as at p. 20 to p. 48 of bundle "A".

(9) In regard to exh. "P8" which is also seen at p. 85 to p. 90 of bundle "A", he can confirm that the Power of Attorney was given by Redbridge Assets Ltd to Fulcrum to sell the 65 million SMG Holdings Limited shares of a public listed company in the Republic of South Africa. He too was able to confirm that exh. "P8" was in relation to the memorandum of deposit of shares in exh. "P7".

(10) In relation to exh. "P8", he alluded to cl. 1 thereof and he said that that clause gives the power to the attorney to sell or join in selling all or any part of the charged securities upon the occurrence of an event of default as defined in the facility agreement at anytime or times and in any manner and on whatever terms as the attorney deems fit provided always that such event of default shall have been certified by Fulcrum's external auditors, KPMG Peat Marwick, or such other person firm or other entity who shall be Fulcrum's external auditors for the time being.

(11) That Fulcrum's external auditors at that time was Messrs Salleh Leong Azlan & Co.

(12) That the power of attorney (first party) by Rahaz Sdn Bhd in favour of Fulcrum dated 9 October 1996 can be seen in exh. "P10" as well as at p. 14 to p. 19 of the plaintiff's bundle of documents marked as "B" (hereinafter referred to as "bundle 'B'"). Exhibit "P10" empowers Fulcrum to sell 22.5 million shares of Merbok Hilir Sdn Bhd. Clause 1 of exh. "P10" is just like cl. 1 of exh. "P8" which provides for Fulcrum's external auditors, Messrs Salleh Leong & Co, to certify an event of default.

(13) That between the years 1996 and 1997, Fulcrum's external auditors was Messrs Salleh Leong Azlan & Co.

(14) In regard to the security document as alluded to in exh. "P11" which can also be seen at p. 20 to p. 33 of bundle "B", it was in relation to a memorandum of charge of shares (third party) between Mohd Salleh bin Yeop Abdul Rahman and Fulcrum involving 6.75 million shares of Merbok Hilir Sdn Bhd. The power of attorney (third party) given by Mohd Salleh bin Yeop Abdul Rahman in favour of Fulcrum dated 9 October 1996 can be seen in exh. "P12" as well as at p. 34 to p. 39 of bundle "B". The schedule to exh. "P12" refers to 6.75 million shares of Merbok Hilir Sdn Bhd. Clause 1 of exh. "P12" is just like cl. 1 of exh. "P10" which provides for Fulcrum's external auditors, Messrs Salleh Leong & Co., to certify an event of default.

(15) Another security document would be the memorandum of charge of shares (third party) between Mohd Azahari bin Abu Kassim and Fulcrum dated 9 October 1996 as seen in exh. "P13" as well as at p. 40 to p. 53 of bundle "B". In relation to exh. "P13", the securities that were charged were two shares in Rahaz Sdn Bhd as reflected in the schedule thereto. And there was also a power of attorney (third party) executed by Mohd Azahari bin Abu Kassim in favour of Fulcrum dated 9 October 1996 as seen in exh. "P14" as well as at p. 54 to p. 59 of bundle "B". The schedule to exh. "P14" refers to the two shares in Rahaz Sdn Bhd while cl. 1 of exh. "P14" is just like cl. 1 of exh. "P12" which provides for Fulcrum's external auditors, Messrs Salleh Leong & Co., to certify an event of default.

(16) Another security document would be the memorandum of charge of shares (third party) between Dato' Samsudin and Fulcrum dated 9 October 1996 as seen in exh. "P15" as well as at p. 51 to p. 64 of bundle "A". Exhibit "P15" was in relation to the memorandum of charge of shares by Dato' Samsudin for the entire balance of the shares of Rahaz Sdn Bhd and the schedule thereto was in relation to 49,998 shares of Rahaz Sdn Bhd. Now, 49,998 shares of Rahaz Sdn Bhd held by Dato' Samsudin plus the two shares held by Mohd Azahari bin Abu Kassim made up the entire paid up capital of Rahaz Sdn Bhd of 50,000 ordinary shares. It must be borne in mind that the entire shares of Rahaz Sdn Bhd were owned by Dato' Samsudin except for the two shares held by Mohd Azahari bin Abu Kassim.

(17) That Dato' Samsudin gave a power of attorney (third party) in favour of Fulcrum dated 9 October 1996 in respect of the 49,998 shares of Rahaz Sdn Bhd can be seen in exh. "P16" as well as at p. 65 to p. 70 of bundle "A".

(18) That he had with him the two share certificates of Rahaz Sdn Bhd together with the duly executed share transform forms. The first share certificate bears number 005 which is for the two shares of Rahaz Sdn Bhd registered in the name of Mohd Azahari bin Abu Kassim while the second share certificate bears number 006 which is for the 49,998 shares of Rahaz Sdn Bhd registered in the name of Dato' Samsudin. That all the share certificates and blank transfer forms were deposited with Fulcrum and these were done to enable Fulcrum to realise the security in the event of default. It would be apparent that Rahaz Sdn Bhd had fulfilled all its obligations in respect of the securities it undertook to furnish under the facility agreement.

(19) That the facility agreement in exh. "P5" and as reflected at p. 20 to p. 48 of bundle "A" was for the total facility of RM76,219,512. Section 4.02 of exh. "P5" was worded in this way:

> Notwithstanding anything herein contained it is hereby agreed and declared between the parties hereto that the total aggregate principal limit of the Facility shall not at any time exceed the sum of RM76,219,512.00 only.

The purpose of the facility was itemised at s. 4.03 of exh. "P5" as:

> The facility shall be applied by the borrower (referring to Rahaz Sdn Bhd) for the purpose of financing up to RM62,500,000.00 only of the balance of the purchase price of the sale and purchase agreement.

Section 2.01 of exh. "P5" defines the words "sale and purchase agreement" to mean:

> the sale and purchase agreement made between LHR (referring to Landmarks Hotel & Realty Sdn Bhd) and Bafana (referring to Bafana Holding Limited) on 21 May 1996.

(20) That when Rahaz Sdn Bhd approached Fulcrum for a loan of RM62,500,000, Fulcrum had enquired as to whether Rahaz Sdn Bhd had the ability to service the interest and Fulcrum were told that Fulcrum had to provide Rahaz Sdn Bhd a loan to pay for the interest and for this purpose Fulcrum gave Rahaz Sdn Bhd a loan of RM76,219,512 and the breakdown was as follows:

(a) RM62,500,000 was to effect the sale and purchase as alluded to in s. 2.01 of exh. "P5"; and

(b) RM13,719,512. was used to pay Fulcrum's interest at the rate of 18% per annum for the twelve months being the duration of the loan.

(21) That s. 4.06 of exh. "P5" stipulates that the tenure of the facility was for a period of twelve months from the date of the first draw down and Fulcrum as the lender may at its sole and absolute discretion and subject to the availability of funds grant such extension as Fulcrum deems necessary to the whole or part of the facility.

(22) That the loan sum of RM76,219,512 included the interest sum of RM13,719,512 that needed to be paid upfront and this is reflected at s. 6.01 of exh. "P5" which states as follows:

> The borrower (referring to Rahaz Sdn Bhd) covenants and agrees that until repayment of the facility as provided in section 7.02 the borrower (referring to Rahaz Sdn Bhd) shall pay interest on the facility at the rate of eighteen percent (18%) per annum ('Prescribed Rate'). The interest shall be paid up front upon disbursement of the facility or any part thereof and the lender (referring to Fulcrum) is hereby authorised by the borrower (referring to Rahaz Sdn Bhd) to deduct the aforesaid interest upon disbursement of the facility.

(23) That s. 6.01 of exh. "P5" as reproduced above provides interest at 18% per annum for the whole loan and interest shall be paid upfront upon the disbursement of the facility and Fulcrum is authorised by Rahaz Sdn Bhd to deduct the interest upfront upon the disbursement of the facility.

(24) That s. 4.08 of exh. "P5" provides for the draw down notice to be in writing in the form and content of Appendix "A" and that Appendix "A" can be seen at p. 48 of bundle "A". It is this form that Rahaz Sdn Bhd has to complete and sign and to return to Fulcrum to enable Fulcrum to disburse the loan.

(25) That by virtue of s. 7.01 of exh. "P5" the parties agreed that Fulcrum had the right to recall or cancel the facility at any time as it deems fit without assigning any reason and that the facility was repayable on demand.

(26) That by virtue of s. 7.02 of exh. "P5", the parties agreed that the facility was to be repaid in one lump sum within twelve (12) months from the date of the first draw down or such extended date as Fulcrum shall in its absolute discretion grant. And this was without prejudice to s. 7.01 of exh. "P5".

(27) That by virtue of s. 10.01 (a) of exh. "P5", the parties agreed that if Rahaz Sdn Bhd failed to pay Fulcrum any sum payable after the same shall have become due whether formally demanded or not, that was an event of default.

(28) That by virtue of s. 11.24 of exh. "P5", the parties agreed that all costs and expenses including solicitors' fees were payable by Rahaz Sdn Bhd on solicitor client basis.

(29) That pursuant to the facility agreement as per exh. "P5", the draw down was effected on 10 October 1996. And the draw down notice dated 9 October 1996 was marked as exh. "P17" and it was worded in this way:

RAHAZ SDN. BHD.
(Co. Reg. No. 222838 V)
Date: OCTOBER 9, 1996

FULCRUM CAPITAL SDN BHD
(Company No. 193390 V)
Lot 271, Jalan Dua
Off Jalan Chan Sow Lin
55200 Kuala Lumpur

Dear Sir,

DRAWDOWN NOTICE
PURSUANT TO THE FACILITY AGREEMENT DATED

Pursuant to abovementioned Facility Agreement, we hereby give notice that we wish to drawdown an advance under the Facility totalling RM76,219,512.00 on OCTOBER 10, 1996 in one lump sum in the following manner:-

(1) to deduct the sum of RM13,719,512.00 as interest for the Facility; and

(2) we hereby irrevocably authorize you to pay the sum of RM62,500,000.00 to LEE HISHAMMUDDIN – ARAB MALAYSIAN BANK BERHAD GROUND FLOOR, PLAZA SEE HOY CHAN JALAN RAJA CHULAN 52000 KUALA LUMPUR

ACCOUNT PARTICULARS: ACCOUNT NO: 00120028251

We hereby represent and warrant to you that:

(a) the representations and warranties stated in Section 3.01 of the Facility Agreement are true and accurate as on the date hereof as if made on such date;

(b) no Event of Default as defined in the Facility Agreement or event which with the giving of notice, or lapse of time, or both, would constitute an Event of Default has occurred and is continuing or would result from the proposed drawdown; and

(c) the making of the drawdown hereby requested will not give rise to any such event as is referred to in (b) above nor will it cause any of the representations and warranties stated in Article III of the Facility Agreement to become untrue or incorrect if made at the date of such drawdown and there is not, so far as we are aware, any reason why we will not be permitted to make any payment as required under the Facility Agreement.

The expressions used in the Drawdown Notice have, unless repugnant to the context, the same meanings as defined in the Facility Agreement.

Yours faithfully
Sgd. (Illegible).
Authorised Signatory.

and under exh. "P17", Rahaz Sdn Bhd's instructions to Fulcrum were to deduct RM13,719,512 from the facility totalling RM76,219,512 as interest for the facility that was extended and to pay the balance of RM62,500,000 to Messrs Lee Hishammuddin. And so in accordance with the instructions, Fulcrum effected the payment of RM62,500,000 to Messrs Lee Hishammuddin and Fulcrum also deducted RM13,719,512 as upfront interest for the entire facility of RM76,219,512 for the period from 10 October 1996 up to 9 October 1997.

(30) That in accordance to the banking practices of Maybank what Fulcrum did was to request for a telegraphic transfer of funds from Fulcrum's account with Maybank to Messrs Lee Hishammuddin's bank account with Arab Malaysian bank in accordance to the details given by Rahaz Sdn Bhd and to effect the transfer, Maybank required Fulcrum's instructions as reflected at p. 106 of bundle "A" (exh. "P18(A)") to be accompanied by a cheque as reflected at p. 107 of bundle "A" that was payable to Malayan Banking Berhad. This was confirmed to be done in accordance with the draw down notice in exh. "P17".

(31) That the facility agreement in exh. "P5" and all the security documents including the draw down notice were dated 9 October 1996 and the draw down was effected on the following day – which was on 10 October 1996 as evidenced in exhs. "P18A" and "P18B".

(32) That subsequent to the draw down, Fulcrum sent to Rahaz Sdn Bhd monthly statements of accounts at the end of each month. And that the tenure of the facility expired on 9 October 1997. The statements of accounts were accordingly marked as exhs. "P19A" to "P19L" as reflected at p. 108 to p. 119 of bundle "A".

(33) That he had access to all the files belonging to Fulcrum.

(34) That the statement of accounts at exh. "P19I" of pa. 116 of bundle "A" indicated that the total interest deducted upfront was RM13,719,512. For clarity exh. "P19I" must be reproduced:

STATEMENT OF ACCOUNTS

Rahaz Sdn Bhd Date: 30/6/97
Box #28 3rd Floor
Wisma Socfin Jalan Semantan
Damansara Heights
50490 Kuala Lumpur
Attention: Y.B. Dato' Samsudin Abu Hassan

Loan Sum : RM76,219,512.00
Reference No : TL/165/09/96/12

Particulars	Amount RM	Total RM
Amount disbursed on 10/10/96		76,219,512.00
Amount due on 9/10/97		76,219,512.00

Note: Total interest deducted upfront – RM13,719,512.00.

All items and balances shown above will be considered correct unless we are notified of any discrepancy within 14 days.

FULCRUM CAPITAL SDN BHD
Sgd. (Illegible).
Authorised Signatory

FULCRUM CAPITAL SDN BHD
Prepared by: Sgd. (Illegible)
Verified by Sgd. (Illegible)
Accounts
Approved by:

(35) The last statement of accounts issued by Fulcrum to Rahaz Sdn Bhd before the tenure of the facility ended can be seen in exh. "P19L" as reflected at p. 119 of bundle "A" which was dated 30 September 1997 and exh. P19L was worded in this way:

STATEMENT OF ACCOUNTS

RAHAZ SDN BHD Date: 30/9/97
Box #28 3rd Floor
Wisma Socfin Jalan Semantan
Damansara Heights
50490 Kuala Lumpur
Attention: Y.B. Dato' Samsudin Abu Hassan

Loan Sum : RM76,219,512.00
Reference No : TL/165/09/96/12

Particulars	Amount RM	Total RM
Amount disbursed on 10/10/96		76,219,512.00
Amount due on 9/10/97		76,219,512.00

Note: 1. Total interest deducted upfront – RM13,719,512.00.
2. Any rebate of interest shall be refunded upon full settlement of loan.

a All items and balances shown above will be considered correct unless we are notified of any discrepancy within 14 days.

FULCRUM CAPITAL SDN BHD
Sgd. (Illegible).
Authorised Signatory

b FULCRUM CAPITAL SDN BHD
Prepared by: Sgd. (Illegible)
Verified by Sgd. (Illegible)
Accounts 30/9/97
Approved by:

c It can be seen that the amount due from Rahaz Sdn Bhd to Fulcrum on 9 October 1997 would be RM76,219,512. But unfortunately, Rahaz Sdn Bhd did not fulfil its obligations and it refused to pay RM76,219,512.

As demonstrated, the evidence of Lum Sing Fai was indeed long and protracted. Mr. M. Pathmanathan for Fulcrum was very meticulous. He diligently referred to
d the exhibits and questioned Lum Sing Fai on those exhibits. It was a time consuming process but it must be done. Lum Sing Fai testified further and his testimony went like this:

(1) That by virtue of a letter dated 23 September 1997 as per exh. "P20" and as seen at p. 123 of bundle "A", Rahaz Sdn Bhd requested Fulcrum to extend
e the tenure of its loan for a further period of six months. Exhibit "P20" went to the heart of the matter and it was worded in this way:

RAHAZ SDN. BHD.
(Co. Reg. No. 222838V)

23 September 1997

f Fulcrum Capital Sdn Bhd
1st Floor, Lot 271, Jalan Dua
Off Jalan Chan Sow Lin
55200 Kuala Lumpur

Attn: Mr Francis Yong

g Dear Sirs,
TERM LOAN FACILITY OF RM76,219,512.00

We refer to the above.

We wish to request for a roll-over of the above term loan facility for a further period of six months.

Your kind consideration on this matter is greatly appreciated.

h Thank you.

Yours faithfully
RAHAZ SDN BHD
Sgd. (Illegible).
MOHD AZAHARI BIN ABU KASSIM
Director

i

Fulcrum replied by letter dated 6 October 1997 and Lum Sing Fai confirmed that this letter of reply was sent just before the expiry of the tenure of the facility and this letter of reply too was confirmed to be faxed to Rahaz Sdn Bhd just before the expiry of the tenure of the facility. The letter of reply dated 6 October 1997 bore the captions: Facsimile Transmission, Urgent, and it was marked as exh. "P21" which can also be seen at p. 124 of bundle "A" and it was worded in this way:

Fulcrum Capital Sdn Bhd
(193390-V)
Lot 271, Jalan Dua,
Off Jalan Chan Sow Lin,
55200 Kuala Lumpur
Malaysia
Tel: 03-2210811 Fax: 03-2217793

FACSIMILE
TRANSMISSION
URGENT

To: Dato' Samsudin Abu Hassan/
En Mohd Azahari

Company: Rahaz Sdn Bhd

Fax No: 03-2551082

Number of pages: 1
(including cover sheet)

From: Francis W.K. Yong

Date: 6 October 1997

Re: EXTENSION FOR TERM LOAN OF RM76,219,512 GRANTED TO RAHAZ SDN BHD

YB Dato'/En Azahari

We refer to your letter to us dated 23rd September 1997 on the abovementioned.

Please be informed that we have received partial approval on the extension of the loan for a further 6 months from our Directors with the final approval pending from Tan Sri Dato' Azman Hashim.

Meanwhile, please be informed that as conditions prior to rollover, the total sum of RM14,344,512 shall be paid to us **on or before 9 October 1997**. The breakdown as follows:

(i) The interest outstanding up to 9/10/97	–	RM13,719,512
(ii) Rollover fee of 1.0% flat on the principal amount	–	RM625,000
Total		**RM14,344,512**

As mentioned to En. Azahari, the final approval for the extension of your loan from Tan Sri Dato' Azman Hashim will strongly depend on you settling the interest outstanding and rollover fee abovementioned by 9 October 1997 given that the intended takeout from Merbok Hilir Bhd's listing is still uncertain.

Thank you.

Best regards,
Sgd. (Illegible).
Francis W.K. Yong

The gist of Fulcrum's reply in exh. "P21" was this: to enable Fulcrum to consider an extension of the facility for a further six (6) months, Rahaz Sdn Bhd as the borrower has to make a partial payment of RM14,344,512 on or before the facility due date of 9 October 1997. And the sum of RM14,344,512 was to cover the payment of RM13,719,512 that was meant to settle the portion of the original loan which was advanced to Rahaz Sdn Bhd to pay for the interest and the balance of RM625,000 was a 1% upfront fee for Fulcrum to consider extending the tenure for the

balance of RM62,500,000 of the original loan. The reply in exh. "P21" also stated that the final approval for the extension of the loan from Tan Sri Dato' Azman Hashim will depend on Rahaz Sdn Bhd paying the sum of RM14,344,512 by 9 October 1997. Lum Sing Fai testified that Rahaz Sdn Bhd did not meet these prior conditions.

There was another letter dated 10 October 1997 which restated the stand of Fulcrum and that letter was marked as exh. "P22" and it can also be seen at p. 125 of bundle "A". Lum Sing Fai confirmed that on 10 October 1997, as per the date of the letter in exh. "P22", the tenure of the facility had expired and he too confirmed that the sum of RM76,219,512. was still overdue and that sum attracted an interest of 18% per annum. By this letter in exh. "P22", Fulcrum reiterated the earlier offer as reflected in exh. "P21" except that Fulcrum extended the period to seven (7) days from the date of exh. "P22". At the last page of exh. "P22" (see p. 126 of bundle "A"), Fulcrum prepared an acknowledgment column but Rahaz Sdn Bhd did not accept the terms and conditions by 17 October 1997. For a smooth flow of the facts, exh. "P22" must be reproduced:

Fulcrum Capital Sdn. Bhd. (193390-V)
(Licensed Moneylender)
A subsidiary of Arab-Malaysian Corporation Bhd

PRIVATE & CONFIDENTIAL
Our Ref: 97/sms/570
October 10, 1997

Rahaz Sdn. Bhd.
3rd Floor, Wisma Socfin
Jalan Semantan
Damansara Heights
50490 Kuala Lumpur

Attn: Dato' Samsudin Abu Hassan/Encik Mohd. Azahari Abu Kassim

YB Dato'/Dear Sirs,

RE: TERM LOAN OF RM76,219,512.00 ('the Facility')
- Reference No. TL/165/09/96/12

We refer to the abovementioned and note your request to extend the tenure of the Facility for a further six months (6) months from October 9, 1997.

In reply, we are pleased to confirm that we are agreeable to your request for the loan extension subject to your fulfillment of the following terms and conditions PRIOR to loan extension:-

(i) Payment of the outstanding interest (calculated at eighteen percentum (18.0%) per annum upfront from October 10, 1996 to October 9, 1997) amounting to Ringgit Malaysia Thirteen Million Seven Hundred Nineteen Thousand Five Hundred and Twelve (RM13,719,512); and

(ii) Payment of loan extension fee of Ringgit Malaysia Six Hundred Twenty Five Thousand (RM625,000) or equivalent to 1.0% flat on the principal amount of RM62,500,000.

Ensuing the above, the new maturity date of the Facility is April 9, 1998.

All other terms and conditions in our Letter of Offer dated September 27, 1996 and the Security Documents for the above facility shall remain unchanged and in force throughout the extended tenure.

Kindly indicate your acceptance of the loan extension conditions abovementioned by signing and returning to us the enclosed duplicate of this letter together with the payment of RM14,344,512 within seven (7) days from the date of this letter, failing which, this offer automatically lapses.

Thank you.

Yours faithfully
FULCRUM CAPITAL SDN BHD

Sgd. (Illegible).	Sgd. (Illegible)
JIMMY LIM THAW CHAY	YIP CHAN SING
Director	Company Secretary

We, Rahaz Sdn. Bhd., hereby acknowledge that we have read and understood the terms and conditions stated above and hereby confirm our acceptance of the said terms and conditions.

Accepted by …
(Name)

...
(Designation)

for and on behalf of Rahaz Sdn. Bhd.

Date:

(2) Dato' Samsudin sent a letter dated 11 October 1997 by fax as seen in exh. "P23" as well as at p. 127 of bundle "A". That letter was addressed to Fulcrum and it was sent by fax. According to Lum Sing Fai, the letter in exh. "P23" was transmitted from South Africa and Fulcrum received the said letter on 13 October 1997. In exh. "P23", Dato' Samsudin requested Fulcrum to allow Rahaz Sdn Bhd up to the end of October 1997 to pay the portion of the loan set by Fulcrum as condition prior to allowing the extension and Dato' Samsudin stated that the basis for doing so was because Rahaz Sdn Bhd was expecting to receive dividend income from its investment in Merbok Hilir by then. The second paragraph of the letter in exh. "P23" stated that Dato' Samsudin wrote the letter on behalf of Rahaz Sdn Bhd. Lum Sing Fai confirmed that in exh. "P23" Dato' Samsudin was referring to a telephone conversation on 9 October 1997 and that the said Dato' made no reference at all to Fulcrum's letter as seen in exh. "P22". Lum Sing Fai testified that according to the letter in exh. "P23", Dato' Samsudin did not disagree with the conditions prior to agreeing to grant an extension by Fulcrum but the said Dato' merely requested deferment of the dateline till the end of October 1997. When questioned further, Lum Sing Fai testified that Fulcrum did not agree to the proposal as set out in exh. "P23". For convenience, I will now reproduce the letter in exh. "P23":

Dato' Samsudin Abu Hassan

11 October 1997
Fulcrum Capital Sdn Bhd
Lot 271, Jalan Dua **PRIVATE AND CONFIDENTIAL**

Off Jalan Chan Sow Lin **FAX NO: 09 (603) 2217793**
55200 Kuala Lumpur
MALAYSIA
Attention: Mr. Francis Yong

Dear Mr Yong

RE: RAHAZ SDN BHD ('RAHAZ')

Greetings from South Africa.

Further to our telephone conversation on the 9 October 1997, I wish to write on behalf of Rahaz that its request to defer the payment of the interest due to the end of October 1997.

The reason being is that a net dividend payment of at least MR35.0m from Merbok Hilir Berhad ('Merbok') is still pending tax exemption confirmation from its auditors and awaiting prior approval from the relevant shareholders. The said dividend was made possible by Merbok when it received about MR60.0 million (US$18.23 million) net proceeds from the sale of its Merbok Formtec Sdn Bhd 50% associate company to Masonite USA which was fully completed on 30 September 1997.

On Merbok's listing proposals, we are however still waiting for the necessary approval from the Security Commission and I have been informed that the relevant approval shall be forthcoming within the next week. I thought this was rather overdue but with the current market conditions the delay was fortunately favourable.

I will inform you of further developments. In the meantime, I shall be back in Malaysia on 20th October for a few days and shall be pleased to meet you.

Thank you and Regards.
Yours sincerely
Sgd. (Illegible).
DATO' SAMSUDIN ABU HASSAN.

Fulcrum did not respond to exh. "P23".

(3) By letter dated 21 October 1997, Rahaz Sdn Bhd wrote to Fulcrum wherein the former enclosed a cheque to the latter for RM1,500,000 being part payment of RM14,344,512 and that letter can be seen at p. 128 of bundle "A" which was marked as exh. "P24" and it was worded like this:

RAHAZ SDN. BHD.
(Co. Reg. No. 222838V)

21 October 1997
Fulcrum Capital Sdn Bhd
1st Floor, Lot 271, Jalan Dua
Off Jalan Chan Sow Lin
55200 Kuala Lumpur
Attn: Mr Francis Yong

Dear Sir,

TERM LOAN FACILITY OF RM76,219,512.00

We refer to the above.

Enclosed please find a cheque no. CKB 966202 for RM1,500,000.00, being part-payment for the interest payable amounting to RM14,344,512.00.

The remaining balance of interest will be paid by end of October 1997.

Kindly acknowledge receipt.

Thank you and kind regards.

Yours faithfully
RAHAZ SDN BHD
Sgd. (Illegible)
MOHD AZAHARI ABU KASSIM
Director.

and the cheque bearing no: CKB 966202 has been exhibited as exh. "P25" at p. 129 of bundle "A".

Correspondence wise the scenario was like this. By letter dated 23 September 1997 (exh. "P20"), Rahaz Sdn Bhd requested from Fulcrum for an extension. Fulcrum responded and wrote two letters (exhs. "P21" and "P22") setting out conditions but these conditions were not met by Rahaz Sdn Bhd. Instead Dato' Samsudin wrote on behalf of Rahaz Sdn Bhd on 11 October 1997 (exh. "P23") agreeing to the interest but seeking deferment to the end of October 1997. By letter dated 21 October 1997 (exh. "P24") Fulcrum confirmed that Rahaz Sdn Bhd had tendered a cheque for RM1,500,000 being part payment for the interest payable amounting to RM14,344,512 – which amount was referred to in exh. "P21".

(4) That in his capacity as head of department of Fulcrum, he knew of the letters which Fulcrum sent dated 6 October 1997 (exh. "P21") and 10 October 1997 (exh. "P22"). He elaborated further. By exh. "P21", Fulcrum asked Rahaz Sdn Bhd to pay a sum of RM14,344,512 before 9 October 1997 as a condition prior to agreeing to extend the loan for six (6) months. In the same letter, the sum of RM14,344,512 comprised of two components. The first component was described as the interest outstanding up to 9 October 1997 to be RM13,719,512. It must be recalled that from the outset of the loan, Rahaz Sdn Bhd had not made any payment themselves. It was Fulcrum who provided the financing for the sale and purchase and who also set aside a portion of the loan to pay for the interest of the term loan facility. The second component was described as the roll over fee of 1% flat on the principal amount which came up to RM625,000.

Lum Sing Fai was asked a pertinent question in regard to the letter dated 6 October 1997 as reflected in exh. "P21". The question was worded in this way:

So the description that interest outstanding up 9.10.97 meant that Rahaz had not paid the loan facility?

and his reply was in this manner:

The interest on the loan facility was deducted upfront and paid for from the portion of the loan granted by Fulcrum.

Fulcrum is now asking Rahaz to pay back that portion in accordance with the agreement.

Lum Sing Fai was also asked the following questions and his answers were very instructive:

Q: If RM13,719,512.00 of the facility of RM76,219,512.00 were to be repaid by Rahaz, what would the balance be?
A: The balance would be RM62,500,000.00.
Q: By this letter of 6th October 1997 (P21) when you charged RM625,000.00 as roll over fee of 1% of the principal amount how much was Fulcrum prepared to consider to agree to extend for 6 months?
A: This portion RM625,000.00 is equivalent to 1% of RM62,500,000.00 which would have been the balance of the loan if Rahaz pays us RM13,719,512.00 by 9 October 1997 and the sum of RM62,500,000.00 is also the amount which Fulcrum was prepared to allow Rahaz a further 6 months to pay provided the sum of RM13,719,512.00 is paid.
Q: Did Fulcrum inform Rahaz at the last paragraph of P21 that notwithstanding their payment of RM14,344,512.00, the final approval for the extension of the loan from Tan Sri Dato Azman Hashim was strongly dependent on Rahaz settling the interest outstanding and the roll over fee by 9 October 1997?
A: Yes, that is so YA.

Therefore, the payment of RM14,344,512 by October 1997 did not automatically entitle Rahaz to the 6 months extension.

In regard to the letter of Dato' Samsudin in exh. "P23", Lum Sing Fai had this to say:

When Dato' Samsudin requested for deferment of the interest due to the end of October 1997, he was in fact referring to that portion of the loan which was the interest that Fulcrum funded of RM13,719,512.00 plus RM650,000.00 totalling RM14,344,512.00 and this is confirmed by Rahaz in their letter dated 21 October 1997 as seen in P24 (page 128 of bundle 'A') where Rahaz specifically refers to RM14,344,512.00 as interest payable.

Lum Sing Fai was also asked the following questions and he gave the answers forthrightly:

Q: In the two letters (P21 and P22), was Fulcrum making a mistake in asking Rahaz to repay interest which it had already paid upfront?
A: Fulcrum did not make a mistake in asking Rahaz to pay RM13,719,512.00 as this sum is part of the loan that will be due on 9 October 1997.
Q: The term "interest outstanding up to 9.10.97" was correctly worded?
A: It would be more correctly described if we were to state it as interest portion of the loan outstanding up to 9 October 1997.
Q: Since the last letter written by Fulcrum on 10 October 1997 (P22) giving Rahaz until 17 October 1997 to pay the sum of RM14,344,512.00, did Fulcrum reply to either P23 or P24?
A: No, Fulcrum did not.

(5) Another interesting letter was a letter dated 18 November 1997 which was sent by Rahaz Sdn Bhd to Fulcrum and that letter was marked as exh. "P26" as seen at p. 130 of bundle "A". That letter was worded in this way:

RAHAZ SDN. BHD.
(Co. Reg. No. 222838V)
18 November 1997

Fulcrum Capital Sdn Bhd
1st Floor, Lot 271, Jalan Dua
Off Jalan Chan Sow Lin
55200 Kuala Lumpur
Attn: Mr Francis Yong

Dear Sir,

TERM LOAN FACILITY OF RM76,219,512.00

We refer to the above and the subsequent meeting between your Mr Francis Yong and Dato' Samsudin Abu Hassan on Friday, 14 November 1997.

We enclose herewith cheque no. PBB161794 for RM6,000,000.00 and MBB577537 for RM500,000.00, for a total sum of RM6,500,000.00, being part-payment of the interest due on the above term-loan facility.

As agreed the balance of the interest is to be rolled-over, together with the principal, for a further period of 6 months expiring on 9 April 1998. We will try to make arrangement to repay part or the whole amount by early next year.

You have also agreed that no legal action is to be taken against Rahaz Sdn Bhd upon payment of this RM6,500,000.00.

Your indulgence on this matter is much appreciated. Kindly acknowledge receipt by signing the duplicate copy of this letter.

Thank you.

Yours faithfully
RAHAZ SDN BHD
Sgd. (Illegible)
MOHD AZAHARI ABU KASSIM
Director.

and by this letter, Rahaz Sdn Bhd was referring to a meeting on 14 November 1997 between Francis Yong and Dato' Samsudin. Lum Sing Fai's testimony in regard to exh. "P26" went like this:

I confirm that by P26 Rahaz tendered payment by two cheques. One, for RM6 million and the other for RM500,000.00 and these were as part payments of the interests that were due.

In P26 at paragraph 3, Rahaz also stated that it has agreed that the balance of the interest has to be rolled over together with the principal for 6 months until 9 April 1998.

At paragraph 4 of P26, Rahaz stated that Fulcrum had agreed not to take legal action against Rahaz.

To my knowledge Fulcrum never agreed to paragraphs 3 and 4 of P26.

I received P26 sometime in the afternoon of 18.11.97. P26 was sent to Fulcrum by hand – hand delivered to Fulcrum's office by a despatch staff.

I was in the office of Fulcrum when P26 was received by Fulcrum. Mr. Francis Yong too was in the office of Fulcrum when P26 was sent by hand to Fulcrum.

I did check and countercheck the contents of P26 with Mr. Francis Yong.

Francis Yong did not agree to paragraphs 3 and 4 of P26. Never.

I was aware that Francis Yong met Dato' Samsudin on 14.11.97.

Francis Yong has no authority to agree to the contents of paragraphs 3 and 4 of P26.

I was shocked when we received the letter in P26 and we immediately drafted a reply to deny and put it right that we never agree.

And the reply to exh. "P26" can be seen in exh. "P27" as reflected at p. 131 of bundle "A". The reply of Fulcrum in exh. "P27" was taken back by the same despatch clerk to Rahaz Sdn Bhd. This was the same despatch clerk that delivered exh. "P26" to Fulcrum. It was explained by Lum Sing Fai that when Rahaz Sdn Bhd's despatch boy arrived with exh. P26, Fulcrum did not want to acknowledge receipt of "P26" on the duplicate copy simply because Fulcrum could not agree to the contents in exh. "P26". Fulcrum held back the despatch boy that afternoon while an immediate reply was being drafted as per exh. "P27" in order to state the stand of Fulcrum.

In exh. "P27", the stand of Fulcrum was made clear. There Fulcrum stated that despite the payment of RM6.5 million that came with exh. "P26", the balance payment after taking into account the payment of RM6.5 million amounted to RM6,344,512 to make up the full sum of RM14,344,512 which had not been paid. Fulcrum also said that they will only consider Rahaz Sdn Bhd's request to roll over the loan for a further six months after the clearance of the cheque. Fulcrum also emphasised that notwithstanding the payments which Fulcrum had received, Fulcrum too reserved its right to pursue any avenues available to them which also included any legal action so long as the facility remained in default.

Calculation wise, Rahaz Sdn Bhd had paid:

(a) RM6.5 million as seen in exh. "P26"; and
(b) RM1.5 million as seen in exh. "P24",

and total sum came up to RM8 million. Thus, Rahaz Sdn Bhd had paid Fulcrum RM8 million even though Fulcrum had asked for the payment of RM14,344,512. There was thus a balance of RM6,344,512 that was still outstanding.

In exh. "P27" at para. 3 thereof, Fulcrum made it clear that their management will only consider the request for the loan extension until 9 April 1998 upon the clearance of the two cheques. In exh. "P27", Fulcrum denied that they agreed not to take any legal action.

Exhibit "P27" was taken back by the same despatch boy that despatched exh. "P26", and the signature of that despatch boy appeared at the right bottom column of exh. "P27". It is now ideal to reproduce exh. "P27" as seen at p. 131 of bundle "A":

FULCRUM CAPITAL Sdn. Bhd.
(Company No. 193390-V)
Licensed Moneylender)
A subsidiary of Arab-Malaysian Corporation Bhd.

PRIVATE & CONFIDENTIAL
Our Ref: 97/fy/609

November 18, 1997

Rahaz Sdn. Bhd.
3rd Floor, Wisma Socfin
Jalan Semantan
Damansara Heights
50490 Kuala Lumpur

Attn: Y.Bhg. Dato' Samsudin Abu Hassan/Encik Mohd. Azahari Abu Kassim

Y.Bhg. Dato'/Dear Sir,

RE: TERM LOAN OF RM76,219,512.00 ('the facility')

Reference No. TL/165/09/96/12

Thank you for your cheques (PBB161794 and MBB577537) amounting to RM6,500,000.00 which we hereby acknowledge receipt.

As you are aware, the balance interest owing to us (calculated up to October 9, 1997) after this payment is RM6,344,512.00. We wish to remind you that the rollover of your loan is CONDITIONAL upon full settlement of the interest owing as per our letter of extension dated October 10, 1997, which was duly accepted by yourselves.

Please note that our management can only consider your request to rollover the balance interest together with the principal for a further six months to expire on April 9, 1998 upon clearance of the two cheques abovementioned. Notwithstanding the above, we have always reserved our rights to pursue any avenues available to us including but not limited to any legal action as long as the loan facility remains in default.

Please acknowledge receipt by signing and returning to us the duplicate copy of this letter.

Thank you.

Yours faithfully
FULCRUM CAPITAL SDN. BHD.

Sgd. (Illegible)	Sgd. (Illegible)
LOH KAM CHUIN	FRANCIS YONG WING KHEONG
Senior Manager	Manager

I/We hereby acknowledge receipt.
Sgd. (Illegible) 5299036 AHMAD ALI
…
Signature/Stamp
Date: 18/11/97.

It must be emphasised that Rahaz Sdn Bhd did not dispute the contents of exh. "P27". However, when Rahaz Sdn Bhd did not respond to exh. "P27", Fulcrum sent a letter to Rahaz Sdn Bhd dated 4 December 1997 as reflected at p. 132 of bundle "A". In exh. P28, Fulcrum informed Rahaz Sdn Bhd that after due consideration Fulcrum was unable to accommodate Rahaz Sdn Bhd's request to roll over the loan and that since the matter had been deliberated by the two parties for two months Fulcrum gave Rahaz Sdn Bhd seven (7) days from the date of exh. "P28" to come back with an acceptable proposal to resolve the matter, failing which Fulcrum will commence the necessary action to recover the loan. In the penultimate paragraph of exh. "P28", Fulcrum informed Rahaz Sdn Bhd that if Fulcrum did not receive an acceptable proposal within seven (7) days thereof, then the entire loan owing to Fulcrum will be sought to be recovered. Incidentally, the seven (7) days dateline as stipulated in the letter in exh. "P28" expired on 11 December 1997. Unfortunately, Rahaz Sdn Bhd did not respond to exh. "P28". I will now reproduce exh. "P28" as seen at p. 132 of bundle "A":

a

Fulcrum Capital Sdn. Bhd.
(Company No. 193390-V)
(Licensed Moneylender)
A subsidiary of Arab-Malaysian Corporation Bhd.

PRIVATE & CONFIDENTIAL
Our Ref: 97/fy/623

b

December 4, 1997

Rahaz Sdn. Bhd.
3rd Floor, Wisma Socfin
Jalan Semantan
Damansara Heights
50490 Kuala Lumpur

By Fax & Hand
Fax No: 03-2551082

c

Attn: YBhg Dato' Samsudin Abu Hassan/Encik Mohd. Azahari Abu Kassim

YBhg Dato'/Dear Sir,

RE: TERM LOAN OF RM76,219,512.00 ('the Facility')
- Reference No. TL/165/09/96/12

d

We refer to the abovementioned and our letter to you dated November 18, 1997 under Ref No: 97/fy/609.

After due consideration, we regret to inform yourselves that we are unable to accommodate your request to rollover the balance interest owing to us (calculated up to October 9, 1997) of RM6,344,512.00.

e

As we have kindly deliberated the settlement of the interest owing for the past two months, we have no alternative but to give yourselves a final ultimatum to fully settle the interest owing. Ensuing that, we would appreciate a concrete and definite proposal from yourselves to resolve the matter soonest possible.

Kindly note that if we do not receive an acceptable proposal from you within seven (7) days from the date hereof, we will commence with the necessary actions to recover

f

the interest owing and if required the entire loan amount owing to us.

Please acknowledge receipt by signing and returning to us the duplicate copy of this letter.

Thank you.

Yours faithfully
FULCRUM CAPITAL SDN. BHD.

g

Sgd. (Illegible)	Sgd. (Illegible)
LUM SING FAI	FRANCIS YONG WING KHEONG
General Manager	Manager.

Lum Sing Fai was asked this question:

Was Rahaz in default of the terms and conditions of the Facility Agreement on

h

11.12.97?

and he gave this reply:

Yes, Rahaz was in default. Rahaz has been in default since 10 October 1997.

A certificate of an event of default was sent by Fulcrum's external auditors Messrs

i

Salleh, Leong, Azlan & Co to Fulcrum and it was dated 11 December 1997 as seen in exh. "P29" at p. 212 of bundle "A". At its last paragraph in exh. "P29", Messrs

Salleh, Leong, Azlan & Co confirmed that an "event of default has occurred in accordance with the terms of the facility agreement dated 9 October 1996 made between FCSB and Rahaz." In its original text, exhibit P29 was worded in this way:

salleh, leong, azlan & co.

akauntan awam public accountants

11th December, 1997
PRIVATE AND CONFIDENTIAL

The Board of Directors
Fulcrum Capital Sdn Bhd
1st Floor, Lot 271, Jalan Dua
Off Jalan Chan Sow Lin
55200 KUALA LUMPUR

Dear Sirs,

CERTIFICATE OF EVENT OF DEFAULT
BORROWER : RAHAZ SDN. BHD. ('RAHAZ')
FACILITY : TERM LOAN OF RM76,219,512.00
REFERENCE NO: TL/165/09/96/12

We refer to your letter dated 11th December, 1997 in connection with the abovementioned facility.

In order to establish whether an event of default has occurred, we have reviewed the following:-

(a) Copy of Fulcrum Capital Sdn. Bhd.'s ('FCSB') Letter of Offer dated 27th September, 1996 issued to Rahaz;
(b) Extracts of Facility Agreement dated 9th October, 1996 between FCSB and Rahaz;
(c) Copy of Letter from Rahaz dated 23rd September, 1997 requesting for extension of loan;
(d) Copy of Letter of Extension dated 10th October, 1997 issued to Rahaz approving the extension for a further six months from 9th October, 1997 subject to the payment of outstanding interest and loan extension fee;
(e) Copy of Letter from Rahaz dated 21st October, 1997 making partial payment and agreeing to pay the balance by end of October 1997;
(f) Copy of Letter from Rahaz dated 18th November, 1997 making partial payment and requesting to rollover the balance to 9th April, 1998;
(g) Copy of FCSB's letter dated 4th December, 1997 informing the inability to accommodate Rahaz's request as per their letter dated 18th November, 1997 and requesting Rahaz to fully settle the interest owing and that FCSB will commence with necessary action to recover the balance owing; and
(h) Rahaz's statement of account maintained by FCSB up to 30th November, 1997.

Based on our examination of the above documents/correspondence, we hereby confirm that an Event of Default has occurred in accordance with the terms of the Facility Agreement dated 9th October,1996 made between FCSB and Rahaz.

Yours faithfully,
SALLEH, LEONG, AZLAN & CO.

In the context of the facility agreement as per exh. "P5", the event of default would be governed by para. (a) of s. 10.01 thereof (see p. 37 of bundle "A") which stipulates that if the borrower shall fail to pay after the same has become due whether

formally demanded or not. It would, however, be ideal to reproduce s. 10.01 (a) of the facility agreement with para. (a) thereto:

> Without prejudice to the Lender's right under Section 7.01 hereof, the Borrower is deemed to have committed a default if the Borrower commits or threatens to commit a breach of any of the covenant undertakings stipulations terms conditions or provisions herein stipulated and without prejudice to the generality of the foregoing, upon the happening of any one or more of the following events:-
>
> (a) If the Borrower shall fail to pay to the Lender any sum payable by the Borrower hereunder after the same shall have become due whether formally demanded or not.

Lum Sing Fai was asked this vital question:

> How in the case of this Facility Agreement, an event of default has occurred?

and he ventured an answer in this way:

> The entire loan sum outstanding of RM76,219,512.00 has become due on 9 October 1997 and Rahaz as the borrower did not settle that sum on the due date.

The statement of accounts dated 31 December 1997 as reflected in exh. "P31B" of p. 122 of bundle "A" showed the amount outstanding as at 31 December 1997 to be RM71,838,012.30 and the "note" below carried this legend:

> This loan is overdue. Late interest at 18% p.a. shall be calculated on daily basis.

On the instructions of Fulcrum, Messrs Iza Ng Yeoh & Kit, advocates and solicitors, sent a letter dated 31 December 1997 by registered post to Rahaz Sdn Bhd for the attention of Dato' Samsudin and that letter was marked as exh. "P32" and it can be seen at p. 214 of bundle "A" and it was worded in this way:

> Dear Sirs
>
> **RAHAZ SDN. BHD. ['RAHAZ']**
>
> **TERM LOAN OF RM76,215,512.00**
>
> **REFERENCE NO. TL/165/09/96/12**
>
> We act for Fulcrum Capital Sdn. Bhd. of 1st Floor, Lot 271, Jalan Dua, Off Jalan Chan Sow Lin, 55200 Kuala Lumpur in the above matter.
>
> Our clients instruct us that pursuant to a Facility Agreement dated 9 October 1996, our clients had disbursed the amount of RM62,500,000.00 on 10 October 1996. The said facility together with interest accrued thereon was to be repaid within twelve (12) months of the date of First drawdown, that is, on or before 9 October 1997.
>
> As you had failed to comply with the terms of extension stipulated by our clients vide their letter dated 10 October 1997 and defaulted in the payment of interest due and payable, our clients hereby cancel the above facility.
>
> As at 31 December 1997, the outstanding balance of the above facility stands at RM71,838,012.31 with further interest accruing thereon at 18% per annum from 1 January 1998 until the date of full settlement.
>
> TAKE NOTICE that our clients hereby require you forthwith to pay or cause to be paid to our clients the abovesaid sum of RM71,838,012.31 plus interest accruing

thereon together with our notice fee of RM575.00 within seven (7) days from the date hereof, failing which, legal proceedings to enforce and recover payment thereof will be taken against you without further reference.

On 13 January 1998, Messrs Iza Ng Yeoh & Kit acting on the instructions of Fulcrum sent a letter of demand to Dato' Samsudin at his address in Kuala Lumpur and that letter of demand was marked as exh. "P33" and it can be seen at p. 216 of bundle "A" and it was worded in this fashion:

Dear Sirs

RAHAZ SDN. BHD. ['RAHAZ']

TERM LOAN OF RM76,219,512.00

REFERENCE NO. TL/165/09/96/12

We act for Fulcrum Capital Sdn. Bhd. of 1st Floor, Lot 271, Jalan Dua, Off Jalan Chan Sow Lin, 55200 Kuala Lumpur in the above matter.

TAKE NOTICE that Rahaz Sdn. Bhd. [Company No. 222838-V] of Box #28, 3rd Floor, Wisma SOCFIN, Jalan Semantan, 50490 Kuala Lumpur, for whom you became and are a guarantor to our clients under an agreement of guarantee in writing dated 3 October 1996, had made default in payment of the above account.

As at 31 December 1997, the outstanding balance of the above facility stands at RM71,838,012.31 with further interest accruing thereon at 18% per annum from 1 January 1998 until the date of full settlement.

Pursuant to the said agreement of guarantee, you agreed to guarantee and pay on demand all sums due and owing to our clients from the Borrower including interest up to a limit of RM76,219,512.00.

TAKE NOTICE that our clients hereby require you forthwith to pay or cause to be paid to our clients the abovesaid sum of RM71,838,012.31 plus interest accruing thereon together with our notice fee of RM575.00 within seven (7) days from the date hereof, failing which, legal proceedings to enforce and recover payment thereof will be taken against you without further reference.

Fulcrum then instructed its solicitors to file a civil suit against Dato' Samsudin and this was done *vide* Kuala Lumpur civil division S5-22-119-1998 and the writ was dated 25 February 1998. This constituted the Samsudin Action.

Acting upon Fulcrum's instructions, Messrs Sri Ram & Co sent a fresh letter of demand to Rahaz Sdn Bhd as seen at p. 225 to p. 226 of bundle "A" which was duly marked as exh. "P34" and it was worded in this way:

Dear Sirs,

Re: LETTER OF DEMAND FOR OUTSTANDING SUM

OF RM79,196,125.22 DUE AND OWING TO

FULCRUM CAPITAL SDN. BHD. AS AT 31ST JULY, 1998

We refer to the above matter wherein we act for Fulcrum Capital Sdn. Bhd. of 1st Floor, Lot 271, Jalan Dua, Off Jalan Chan Sow Lin, 55200 Kuala Lumpur.

We are informed by our client that they have offered yourselves a loan of RM76,219,512.00 ('the Loan') vide our client's Letter of Offer dated 27th September, 1996 which offer was accepted by yourselves.

We are also informed by our client that pursuant to the said Letter of Offer, you and our client has entered into a Facility Agreement ('the Facility Agreement') dated 9th October, 1996 wherein our client advanced the Loan to you upon the terms and conditions referred to therein, full particulars of which are within your knowledge.

Our client instructs that the loan was disbursed to you in full on 10th October, 1996.

We are further instructed by our client that pursuant to the terms of the Facility Agreement the loan became due and repayable in full on the expiry of one year from the aforesaid date of drawdown i.e. on 9th October, 1997 which date was extended by our client, upon your request, for a further six (6) months to mature on 9th April, 1998 and subject to conditions stated in our client's letter dated 10th October, 1997.

Our client instructs that pursuant to your default of the conditions of the Facility Agreement and our client's letter dated 10th October 1997, our client gave you notice by letter dated 4th December, 1997 to settle all outstanding in full together with a concrete proposal to resolve the outstanding within seven (7) days thereof failing which our client would commence legal proceedings to recover the same.

We are further informed by our client that you have failed, refused and/or neglected to comply with the aforesaid notice and there is a sum of RM79,196,125.22 due and owing by you to our client as at 31st July, 1998 together with interest on the sum of RM70,380,272.95 at the rate of 18% per annum from 1st August, 1998 until the date of full settlement.

TAKE NOTICE that unless we as solicitors receive the aforesaid sum of RM79,196,125.22 together with further interest at the aforesaid rate until the date of full settlement **within seven (7) days** from the date hereof, we have strict instructions to commence legal proceedings against you for recovery of the same in which event you will be liable for the costs incurred thereby.

Rahaz Sdn Bhd's solicitors by the name of Messrs Atma Singh Veriah & Co by letter dated 17 September 1998 replied to the fresh letter of demand from Messrs Sri Ram & Co and the reply was marked as exh. "P35" which can be seen at p. 227 to p. 228 of bundle "A" and it was worded in this manner:

Dear Sirs,

We act for Rahaz Sdn Bhd of 3rd Floor, Wisma Socfin, Jalan Semantan, 50490 Kuala Lumpur and have been handed your letter dated 3rd September 1998 with instructions to reply as follows:

In reply to paragraph 5 of your aforesaid letter we are instructed to state that the loan was to become due and repayable in full on the expiry of one year from the date of drawdown but was extended for a period of 6 months to the 9th of April 1998.

However your client's conditions for the extension set out in their letter dated 10th October 1997 namely,

i) payment of outstanding interest for the period of 10th October 1996 to 9th October 1997 for the alleged sum of RM13,719,512.00 and

ii) payment of loan extension fee of RM625,000.00

were unlawful and null and void as interest for the period 10th October 1996 to 9th October 1997 had already been paid upfront from the said loan facility and further there was no provision for the payment of a loan extension fee.

In reply to paragraph 6 of your aforesaid letter our client states that by reason of the matters aforesaid there was no default of the terms set out in your client's letter dated

10th October 1997 and your client's notice dated 4th December 1997 is also unlawful and null and void.

Your client had by letter dated 31st December 1997 unlawfully cancelled the above loan facility when there was no default in the payment of interest for the alleged period from 10th October 1996 to 9th October 1997.

By reason of your client's unlawful cancellation of the loan facility our client has suffered loss and damage particulars whereof will be furnished in due course.

In reply to paragraph 7 of your aforesaid letter, our client admits refusing to comply with your client's unlawful demands act set out in your client's letter dated 4th December 1997 and states that by reason of the matters aforesaid our clients are justified in refusing to comply with the same.

In reply to paragraph 8 of your aforesaid letter we write to inform you that we have instructions to accept service of process on behalf of our client.

Yours faithfully.

It would be apparent that Rahaz Sdn Bhd's solicitors disputed the fresh letter of demand from Messrs Sri Ram & Co. To clear the air, so to speak, Mr. M. Pathmanathan asked Lum Sing Fai the following questions:

Q: Was the loan extended by Fulcrum until 9.4.98?

A: No.

Q: With reference to paragraph 2 of exhibit P35, you told the court the period of the loan was not extended?

A: Yes, I confirm that.

Q: With regard to paragraph 3 of P35, do you agree that if the conditions for extensions were null and void, a valid extension can be given?

A: No

Q: Do you agree that condition(i) of P35 for extending the loan, you were asking Rahaz to pay interest for the period of 10.10.96 to 9.10.97?

A: No.

Q: As to the payment of the loan extension fee it was contended in P35 that there was no such provision in the Facility Agreement, do you agree that section 4.06 of the Facility Agreement expressly provided for an extension at Fulcrum's sole and absolute discretion?

A: Yes, I agree that section 4.06 of the Facility Agreement gives Fulcrum the sole and absolute discretion. A similar clause appears at section 7.02 of the Facility Agreement.

In due course, on the instructions of Fulcrum, a suit was filed at the Kuala Lumpur High Court *vide* D4-22-3748-1998 against Rahaz Sdn Bhd. This constituted the Rahaz Action.

(6) That the interest of RM13,719,512 for the total loan deducted upfront can clearly be seen in the draw down memorandum marked as exh. "P36" as seen at p. 50 of bundle "A" and for clarity it should be reproduced:

a

FULCRUM CAPITAL SDN BHD
DRAWDOWN MEMORANDUM

To : YCS/CMY
From : LSF/FY Date: October 9, 1996

TERM LOAN OF RM76,219,512.00 GRANTED TO RAHAZ SDN. BHD.

b

Please arrange for drawdown of RM76,219,512.00 value date October 10, 1996 to be made in the following manner:

1. RM62,500,000.00 to: LEE HISHAMMUDDIN

Account Particulars:-

c

Bank:	Arab Malaysian Bank Berhad Ground Floor, Plaza See Hoy Chan Jalan Raja Chulan 52000 Kuala Lumpur
Account No:	00120028251
Special Instruction:	The funds MUST be in the abovementioned account LATEST by **12:00 noon, Thursday, October 10, 1996.**

d

2. RM13,719,512.00 being our interest for the total loan deducted upfront.

Sgd. (Illegible)
JL/SKW's approval.

(7) That when Fulcrum asked for RM13,719,512 as one of the conditions to e consider Rahaz Sdn Bhd's request for an extension of the loan for six (6) months, Fulcrum was not claiming any sum more than what was due to Fulcrum.

(8) That Fulcrum did not at any time agree to extend the loan facility for six (6) months from 9 October 1997 to 9 April 1998.

f (9) The amount due and owing from Rahaz Sdn Bhd to Fulcrum on 9 October 1997 as at the close of business was RM76,219,512. This was the amount of the loan that was disbursed which comprised of two tranches.

Tranche one comprised of RM13,719,512 as an upfront interest financed by Fulcrum on behalf of Rahaz Sdn Bhd – the borrower. Tranche two comprised of RM62,500,000 which was meant to allow Rahaz Sdn Bhd to complete the sale and g purchase agreement as alluded to earlier.

But Rahaz Sdn Bhd had not paid any monies to reduce any part of the loan as at 9 October 1997. In fact, there was no dispute between Fulcrum and Rahaz Sdn Bhd in regard to the amount of money that was due and owing on 9 October 1997.

h (10) When Rahaz Sdn Bhd requested for an extension of the entire loan of RM76,219,512 on 23 September 1997, Fulcrum responded that they were not prepared to consider extending the entire loan as up to then Rahaz Sdn Bhd had not taken out a single cent from their own funds. Since Fulcrum had been financing Rahaz Sdn Bhd for both the sale and purchase together with the interest, the least which Rahaz Sdn Bhd could do was to reduce its loan by paying up tranche one comprising of RM13,719,512 before Fulcrum could i even consider extending the balance outstanding.

Lum Sing Fai was then asked the following questions and he gave answers thereto:

Q: Would it be right to say that you were not prepared to extend both tranches, but only tranche two of RM62.5 million?

A: That's right.

Q: Apart from asking Rahaz Sdn Bhd to reduce the loan by repaying tranche one of RM13,719,512.00 was there any other payment that you asked Rahaz to effect before considering an extension?

A: We also asked Rahaz for an upfront fee of 1% flat to process the request and this 1% was worked on the amount of RM62,500,000.00 being the portion of the loan we were prepared to consider extending and that was why we specifically asked for RM625,000.00.

Q: Did the negotiations between Fulcrum and Rahaz for the extension of the loan facility culminated in an agreement?

A: No, it did not.

Q: Since the event of default took place at the close of business on 9 October 1997 did the outstanding loan attract any further interest under the terms and conditions of the Facility Agreement?

A: Yes, the entire sum outstanding of RM76,219,512.00 will continue to attract interest at 18% per annum in accordance to the terms and conditions of the Facility Agreement.

The statement of claim in bundle "C" in the Samsudin action was then shown to Lum Sing Fai and he was asked:

Q: Did Fulcrum at any time ask Rahaz to pay double interest?

A: No, we did not.

At para. 17 of the statement of claim in the Samsudin Action as seen at p. 14 of bundle "C" it was averred that:

> By letter dated 4 December 1997, the plaintiff issued an ultimatum upon terms more specifically specified therein to the Borrower.

and the letter dated 4 December 1997 was in fact the letter marked as exh. "P28" of p. 132 of bundle "A". In regard to para. 19.1 of the statement of claim in the Samsudin Action as seen at p. 14 of bundle "C", Lum Sing Fai confirmed the correctness of its contents and that paragraph was worded like this:

> In exercise of the powers conferred by the Memorandum of charge of shares, the plaintiff, between the dates 12 December 1997 to 4 February 1998, sold 591,400 shares of SMG Holdings Limited in the Johannesburg Stock Exchange realising net proceeds of South African Rand 284,983.35 ("the Net Proceeds").

In regard to para. 20 of the statement of claim in the Samsudin Action as seen at p. 15 of bundle "C" which was worded as follows:

> By letter dated 31 December 1997, Messrs Iza Ng Yeoh & Kit, solicitors for the plaintiff demanded from the Borrower payment of the sum of RM71,838,012.31 with interest accruing from 1 January 1998 at the rate of 18% per annum until the date of full settlement.

and that letter of demand can be seen in exh. "P32" at p. 214 of bundle "A" which had been reproduced earlier. Lum Sing Fai then proceeded to confirm the following state of affairs:

(1) that Dato' Samsudin did not respond to the demand made by Messrs Iza Ng Yeoh & Kit as alluded to at para. 21 of the statement of claim in the Samsudin Action;

(2) that Dato' Samsudin was in breach of the terms and conditions of his own personal guarantee as seen in exh. "P6";

(3) that by cl. 1 of the personal guarantee at exh. "P6", Dato' Samsudin was to pay on demand all monies due. The guarantee was an on demand guarantee;

(4) that by cl. 14 (ii) of the personal guarantee at exh. "P6", a notice of demand once given would mean that it was conclusive evidence in regard to the amount that has accrued;

(5) that by cl. 23 of the personal guarantee at exh. "P6", Dato' Samsudin agreed to bear the costs and expenses incurred therein;

(6) that the prayers at para. 22 of the statement of claim in the Samsudin Action were drafted in accordance with the letter of demand as seen in exh. "P32";

(7) that the costs as alluded to in para. 22 (c) of the statement of claim in the Samsudin Action which Fulcrum was claiming fall under cl. 23 of the personal guarantee of Dato' Samsudin in exh. "P6";

(8) that by cl. 15 of the personal guarantee at exh. "P6", the demand shall be deemed to be given or made or received at the time when the letter would in the ordinary course of post be delivered; and in this connection Dato' Samsudin did not dispute that he had received the letter dated 13 January 1998 as seen at p. 216 of bundle "A" which was marked as exh. "P33";

(9) that the certificate of posting of Post Malaysia for exh. "P33" has been exhibited as exh. "P37" as seen at p. 217 of bundle "A"; and

(10) that Fulcrum's claim against Dato' Samsudin as seen in the statement of claim in the Samsudin Action was in accord with the terms and conditions of the personal guarantee executed by Dato' Samsudin in exh. "P6".

Section 79 of the Contracts Act 1950 defines a "contract of guarantee" as "a contract to perform the promise, or discharge the liability, of a third person in case of his default." The person who gives the guarantee is called the "surety" or "guarantor", while the person in respect of which default the guarantee is given is called the "principal debtor". And the person to whom the guarantee is extended to is called the "creditor". In plain simple language, a guarantee is a promise by the guarantor to answer for the default of the principal debtor to the creditor.

Exhibit "P6" is captioned as a "personal guarantee" and that would certainly indicate that it relates to a contract of guarantee (*Goulston Discount Ltd v. Clark* [1967] 2 QB 493 at 498 per Danckwerts LJ; *Western Credit Ltd v. Alberry* [1964] 2 All ER 938 at 940 per Davies LJ; and *Crown Lumber Co Ltd v. Engel* [1961] 28 DLR (2d) 762). The heading of the instrument as reflected in exh. "P6" was quite decisive. In consideration of Fulcrum, at Dato' Samsudin's request, agreeing to make or continuing to make available the term loan facility for the principal sum of

RM76,219,512 to Rahaz Sdn Bhd, Dato' Samsudin hereby agree with and guarantee Fulcrum as follows:

> I will pay to you on demand all moneys which now are or may be owing to you from the Borrower solely or from the Borrower jointly with any other person(s) firm(s) company(ies) or remaining unpaid on the general balance of the Borrower's account with you including advances overdrafts discounts bills or notes held by you on or in respect of which the Borrower may be or has been liable to you in respect of commission and other ordinary banking expenses including interest at the rate of eighteen percent (18%) per annum or at such other rate as may from time to time be prescribed or allowed by you including any compound interest charged by you although the relation of banker and customer may have ceased and all costs charges and expenses which you may incur in enforcing or seeking to enforce any security for or obtaining or seeking to obtain payment of all or any part of the moneys hereby guaranteed. I also hereby agree that your certificate, duly executed by any General Manager Assistant General Manager Senior Manager Assistant Manager or any other officer for the time being of yours, as to the amount due and owing by me and as to interest and any other sum(s) payable by me hereunder shall in the absence of manifest error be final and conclusive and shall not be questioned on any account whatsoever.

By cl. 14 (ii) of the "personal guarantee" in exh. "P6", which is worded as follows, Dato' Samsudin further shackled himself to Fulcrum:

> If no account is settled or stated by or between you and the Borrower or admitted by or on behalf of the Borrower a Notice of Demand shall from time to time be given by you to me and on receipt of any such notice I will forthwith pay to you the amount stated therein as due, such notice of demand being as between you and me conclusive evidence that my liability hereunder has accrued in respect of the amount(s) claimed.

By cl. 23 of the "personal guarantee" in exh. P6, Dato' Samsudin further agreed:

> I agree that all costs and expenses (legal or otherwise and where legal both judicial and extra judicial on a solicitor and client basis) incurred or paid by you under this guarantee or for the collection or recovery of any moneys due or to become due hereunder shall be borne and paid for by me absolutely.

Of course, it would be appropriate to refer to English cases on guarantee. Lord Scarman in *Jamil bin Harun v. Yang Kamsiah Meor Rasdi & Anor* [1984] 1 CLJ 215; [1984] 1 CLJ (Rep) left the matter entirely to our courts to decide and this was what he said:

> Their Lordships do not doubt that it is for the courts of Malaysia to decide, subject always to the statute law of the Federation, whether to follow English case law. Modern English authorities may be persuasive, but are not binding. In determining whether to accept their guidance the courts will have regard to the circumstances of the States of Malaysia and will be careful to apply them only to the extent that the written law permits and no further than in their view it is just to do so.

At any rate, s. 3 of the Civil Law Act 1956 (Revised 1972) provides that English law shall apply "save so far as other provision has been made or may be made by any written law in force in Malaysia." Likewise, s. 5 of the Civil Law Act 1956 (Revised 1972) provides for the application of English law to commercial matters "unless in any case other provision is or shall be made by any written law". Taking

the cue that was sounded by Lord Scarman in *Jamil bin Harun v. Yang Kamsiah (supra)*, I need to refer to the speech of Lord Selborne in the case of *Lakeman v. Mountstephen* [1874] LR 7 HL 17 and there his Lordship succinctly said:

> There can be no suretyship unless there be a principal debtor, who of course may be constituted in the course of the transaction by matters *ex post facto* and need not be so at the time, but until there is a principal debtor there can be no suretyship. Nor can a man guarantee anybody else's debt unless there is a debt of some other person to be guaranteed.

Here, the full loan facility had been disbursed on or about 10 October 1996, and the loan became due and payable on or about 9 October 1997. There was default and Dato' Samsudin who gave a personal guarantee must now pay that loan to Fulcrum. Rahaz Sdn Bhd as the principal debtor was unable to repay the loan facility to Fulcrum, and Dato' Samsudin who gave a personal guarantee must now be held accountable.

But the guarantor's liability must not be different in kind or greater in extent than that of the principal debtor (*Direct Acceptance Finance Ltd v. Cumberland Furnishings Pty Ltd* [1965] NSWR 1504 at 1510). Lord Selborne once remarked in *Duncan Fox & Co. v. North and South Wales Bank* [1880] 6 App Cas 1 at 13 that the surety/guarantor and the principal debtor were liable for the "same debt". In *Jowitt v. Callaghan* [1938] 38 SR (NSW) 512, 516, Jordan CJ explained the contract of guarantee in these salient words:

> The contract of guarantee or suretyship is a contract between two persons which is intended by them to secure the performance of the obligation of a third person to one of them. The existence, present or future, of the obligation of a third person, and an intention in the parties to the contract to secure the performance of that obligation, are essential features of a contract of guarantee. If these elements are present, the contract is one of guarantee whether the promise be collateral to the promise of a principal obligor and in the nature of a distinct and separate promise to perform the principal obligation if it does not: *Inland Revenue Commissioners v. Holder* [1931] 2 KB 81 at 101-102; *Elder v. Northcott* [1930] 2 Ch 422 at 430; or whether it be a joint promise with the principal obligor by virtue of which an immediate obligation is assumed to the obligee which is joint with that of the principal obligor: *Permanent Trustee Co of New South Wales Ltd v. Hinks* [1934] 34 SR (NSW) 130 (in which case, there is suretyship in equity though not at common law: *Wauthier v. Wilson* [1912] 28 TLR 239); and whether the promise be a promise to be personally liable if the principal obligor does not perform the obligation, or a promise merely that certain property of the promisor shall be a security for the performance of the principal obligation: *Re Conley, Ex parte Trustee v. Barclay's Bank Limited* [1938] 2 All ER 127.

It is said that the guarantor's liability is contingent upon the principal debtor's continuing liability and finally that of the principal debtor's default (*Guild & Co v. Conrad* [1894] 2 QB 885 at 896; *Coady v. J. Lewis & Sons Ltd* [1951] 3 DLR 845; *Western Dominion Investment Co v. MacMillan* [1925] 2 DLR 442 which was affirmed on appeal as reported in [1925] 4 DLR 562 (CA); and *Commercial Banking Co of Sydney Ltd v. Patrick Intermarine Acceptance Ltd (in liquidation)* [1978] 52 ALJR 404 at 406). However, in law, there is nothing to prevent the creditor from suing the guarantor first before the creditor proceeds to sue the principal debtor.

Latham CJ in *McLean v. Discount & Finance Ltd* [1939] 64 CLR 312, 328 supports this very proposition and there his Lordship had this to say:

> A creditor to whom guarantees have been given may compel any surety to pay according to his contract. He is not bound to take any steps to distribute the burden among the sureties. Thus a surety who has guaranteed the whole of the debt may be compelled to pay the whole debt even though there are other sureties.

I even venture to say that a guarantor who has not paid the principal debt cannot insist that the creditor has to proceed against the principal debtor (*Jackson v. Digby* [1854] 2 WR 540; *Moschi v. Lep Air Services Ltd* [1973] AC 331 at 356-357; *Ewart v. Latta* [1865] SC 36; *Carter v. White* [1883] 25 Ch D 666 at 670; *Morrison v. Barking Chemicals Co Ltd* [1919] 2 Ch 325). The guarantor too cannot insist that the creditor proceeds against the co-guarantor or even insist that the creditor enforce any securities that may be held for the debt before proceeding to sue the guarantor (*China & South Sea Bank Ltd v. Tan* [1989] 3 All ER 839). In this connection, the House of Lords in the case of *Ewart v. Latta (supra)* announced through Lord Westbury LC at p. 41 of the report that:

> It is quite a misapprehension to suppose that there is any equity entitling the surety to compel the creditor to discuss the principal – unquestionably the surety has no such right unless he pays the whole debt.

It seems to me that it is the duty of the guarantor, and not the creditor, to ensure that the principal debtor performs the obligation to pay the creditor (*Moschi v. Lep Air Services Ltd (supra)*). The creditor, on the other hand, must be left free to pursue the available remedies under the law.

So much for the law. I will now revert to the evidence of Lum Sing Fai.

In regard to the statement of defence and counterclaim in the Samsudin Action, reference to para. 11 thereto was made which can be seen at p. 33 of bundle "C" and it was worded as follows:

> The Defendant admits paragraphs 12 (a), (b) and (c) of the Statement of Claim but states that the demand by the plaintiff for the payment of the alleged outstanding interest (calculated at 18% per centum per annum upfront for period 10.10.1996 to 9.10.1997) amounting to RM13,719,512.00 is unlawful, invalid and null and void as the interest for the said period namely 10.10.1996 to 9.10.1997 amounting to RM13,719,512.00 had been disbursed upfront by the plaintiff to itself on the 10.10.1996 when disbursing the sum of RM62,500,000.00 to Messrs Lee Hishammuddin pursuant to the exercise of its rights to do so under section 6.01 of the Facility Agreement.

and flowing from this, Lum Sing Fai said that Fulcrum was asking for the repayment of tranche one of the loan. The following questions and answers then followed:

> Q: Can you confirm that the interest for the loan facility was already paid on 10 October 1996 in the sum of RM13,719,512.00 which money belong to Fulcrum. And that interest of RM13,719,512.00 was a loan given by Fulcrum to Rahaz?
>
> A: Yes, the interest of RM13,719,512.00 was a loan given by Fulcrum to Rahaz.

Q: Was Fulcrum aware at all material times that interest of RM13,719,512.00 for the loan had already been paid on 10.10.96?

A: Yes, we were aware.

Q: Similarly was the defendant also aware that the interest of RM13,719,512.00 had been paid on 10.10.79?

A: The defendant should be clearly aware as monthly statements clearly reflecting this has been sent to the borrower to the attention of the guarantor. And this is reflected in exhibits P19A to P19L – which reflected that the amount that would be due on 9.10.97 will be RM76,219,512.00.

Q: At paragraph 14b of the Statement of Defence and Counterclaim (see page 35 of bundle "C"), the defendant contended that on 14.11.97 an agreement was reached between the plaintiff and the defendant that upon payment of RM6,500,000.00 the loan shall be rolled over and no legal proceedings will be commenced and now I ask you.

Is that correct?

A: No, there can't be any agreement.

Q: At paragraph 15e of the Statement of Defence and Counterclaim (see page 35 of bundle "C") where the defendant contended that there was no default on their part of the loan facility agreement, is that correct?

A: No. The borrower is in default of the loan agreement from the opening of business on 10 October 1997 where they made no attempt to pay the loan on the due date in accordance with the facility agreement.

Lum Sing Fai testified that Fulcrum had an absolute discretion to exercise its power when the borrower failed to repay the loan on 9 October 1997 in accordance to s. 10.01 of the facility agreement and that a certificate of default had been obtained from Fulcrum's external auditors Messrs Salleh Leong Azlan & Co in accordance with cl. 1 of the power of attorney. Lum Sing Fai did not agree in regard to the averment at para. 28 of the defendant's counterclaim as seen at p. 39 of bundle "C" which stated that the sale of the SMG Holdings Limited shares in the Johannesburg Stock Exchange had resulted in damage to the security that was given as well as to the defendant's standing. In regard to the threat to sell the Merbok Hilir Bhd shares belonging to the defendant that was alluded to at para. 29 of the defendant's counterclaim as seen at p. 40 of bundle "C", Lum Sing Fai testified that Fulcrum had the right to sell the Merbok Hilir Bhd shares that were charged to Fulcrum. Lum Sing Fai also testified that Fulcrum had the right to sell the SMG Holdings Limited shares. To a question whether Dato' Samsudin charged any Merbok Hilir Bhd shares in favour of Fulcrum, Lum Sing Fai said that Fulcrum was not aware. According to him, the parties that charged the Merbok Hilir Bhd shares to Fulcrum were Rahaz Sdn Bhd and Mohd Salleh bin Yeop Abdul Rahman. Lum Sing Fai testified that it was not correct to say that the Merbok Hilir Bhd shares belonged to Dato' Samsudin. Thus, it was wrong to say as was said at para. 29 of the defendant's counterclaim at p. 40 of bundle "C" that Dato' Samsudin would suffer loss and damage as far as Merbok Hilir Bhd shares were concerned. By virtue of exh. "P7" as seen at p. 71 of bundle "A", Lum Sing Fai was able to confirm that 65 million SMG Holdings Limited shares belonged to Redbridge Assets Ltd and not Dato' Samsudin. According to Lum Sing Fai, Fulcrum had relied on the power to sell the SMG Holdings Limited shares under cl. 12 of exh. "P7". The identical power

of sale was also accorded to Fulcrum in regard to the 49,998 shares of Rahaz Sdn Bhd as reflected in exh. "P15" – which was a memorandum of charge of shares executed by Dato' Samsudin in favour of Fulcrum. In regard to the other memorandum of charge of shares, the same identical provisions of the power of sale were incorporated therein.

According to Lum Sing Fai, Fulcrum opposed the prayers at para. 30 of the defendant's counterclaim as seen at p. 40 of bundle "C" where Dato' Samsudin sought an injunction to restrain Fulcrum from exercising its powers in respect of the balance of the SMG Holdings Limited shares and all the other securities. For all these reasons, Fulcrum prayed that the statement of defence and the counterclaim in the Samsudin Action be dismissed with costs. Lum Sing Fai testified that the statement of claim in the Samsudin Action and the reply and defence to counterclaim in the Samsudin Action were true as to the facts as they stood on 24 February 1998 which was the date of the statement of claim in the Samsudin Action. Lum Sing Fai was able to confirm that since the filing of the present action there has been further developments in that further securities were realised and dividends were received that would certainly alter the figures claimed thus far.

For convenience, I will now allude to the Rahaz Action.

In regard to the Rahaz Action, the writ of summons and the statement of claim in bundle "C" were referred to and it involved a claim by Fulcrum against Rahaz Sdn Bhd for breach of the facility agreement. At paras. 16 (a) and 16 (b) of the statement of claim in the Rahaz Action, Fulcrum said that it was unable to accommodate the defendant's request to roll over the balance interest owing as at 9 October 1997 amounting to RM6,344,512 and that Rahaz Sdn Bhd was required to settle the interest fully and ensuing from that Rahaz Sdn Bhd was required to provide a concrete proposal to resolve the matter within seven days thereof in default Fulcrum would commence the recovery action to recover the interest owing and the entire loan amount owing to Fulcrum. All these can be seen in exh. "P28" at p. 132 of bundle "A". And as alluded to at para. 17 of the statement of claim in the Rahaz Action as seen at p. 79 of bundle "C", Rahaz Sdn Bhd did not comply with the seven days ultimatum.

In so far as the Rahaz Action was concerned, the evidence of Lum Sing Fai went like this:

(1) That Fulcrum did not grant to Rahaz Sdn Bhd an extension of the loan for six months.

(2) Had Fulcrum granted the extension, which was denied by Fulcrum, the extension would have expired on 9 April 1998.

(3) On or by 9 April 1998 the entire loan sum together with interest would be due and payable by Rahaz Sdn Bhd.

(4) That since there was no extension by Fulcrum, the event of default took place on 10 October 1997 and on that date the entire loan together with the interest were not paid by Rahaz Sdn Bhd.

(5) In regard to para. 17 of the statement of claim as per p. 79 of bundle "C", he strictly denied granting an extension of six (6) months. If there was an

extension, which was denied, the extended date had come to past upon the filing of the Rahaz Action.

(6) That pursuant to Messrs Sri Ram & Co's letter of demand dated 3 September 1998 as seen in exh. "P34" of p. 225 of bundle "A", Fulcrum claimed for a sum of RM79,196,125.22 as per para. 19 of the statement of claim in the Rahaz Action at p. 81 of bundle "C" together with interest on the sum of RM70,380,272.95 at the rate of 18% per annum from 1 August 1998 until the date of full settlement as reflected at para. 21(b) of the statement of claim in the Rahaz Action as per p. 82 of bundle "C" and Fulcrum too claimed for costs on solicitors' clients' basis as provided for in the facility agreement.

In regard to the statement of defence and counterclaim in the Rahaz Action as seen at p. 96 to p. 106 of bundle "C" particularly at para. 8 thereof, Lum Sing Fai explained that the sum of RM13,719,512 together with the sum of RM625,000 which made up a total sum of RM14,344,512 were, in fact, a request for payment of the interest portion of the loan and the extension fee. Lum Sing Fai categorically stated that no agreement was reached between the plaintiff and the defendant in the Rahaz Action in regard to the loan being rolled over; and neither was there an agreement that the plaintiff will not commence legal action against the defendant. Lum Sing Fai said that there can't possibly be an agreement reached between the parties on those lines because even the defendant claimed that it was a mistake of fact. At para. 15(b) of the statement of defence and counterclaim in the Rahaz Action, it was pleaded that the defendant was not in default but Lum Sing Fai disagreed and he testified that the defendant had been in default since 10 October 1997 and that being the case the notice of demand dated 31 December 1997 was not premature. To a question as to whether Fulcrum admit either that the demand was premature or that the defendant in the Rahaz Action had suffered losses and damages, Lum Sing Fai replied in the negative and he further added that Fulcrum prayed for the dismissal of the counterclaim as well as the defence. Lum Sing Fai then categorically said that the facts as pleaded in the statement of claim in the Rahaz Action dated 9 October 1998 were true as of that day. And that since 9 October 1998 further securities have been sold and dividends received that would alter the figures.

Under cross-examination, Lum Sing Fai testified as follows:

(1) In regard to the documents entitled "Scope of Work And Responsibilities" marked as exhs. "P1(A)" to "P1(F)" and as seen at p. 133 to p. 140 of bundle "A", those documents served to inform as well as to remind the employees of Fulcrum as to the scope of their authorities.

(2) That the documents incorporated in the "Standard Operating Procedure" marked as exh. "P2" and as seen at p. 141A of bundle "A" were the operating procedure manual of Fulcrum for the use of its employees.

(3) That exhs. "P1(A)" to "P1(F)" and exh. "P2" were the internal documents of Fulcrum and that copies of these documents were not made available to Fulcrum's clients.

(4) That Francis Yong held the title of a manager.

(5) That the documents at p. 138 of bundle "A" (exh. "P1D") and at p. 141 of bundle "A" (exhs. "P1(C), (D), (E), (F)") were prepared prior to 1998 and they were in their original forms. Although Francis Yong held the job title of a manager, the applicable job description for him would be in exh. "P1D" of p. 138 of bundle "A" as well as exhs. "P1(C), (D), (E), (F)" of p. 141 of bundle "A". That the change in job designations would also apply to the earlier pages as seen from exhs. "P1A" to "P1D" of p. 133 to p. 138 of bundle "A". That exh. "P1B" of p. 135 of bundle "A" listed the job title as manager which would apply to KC Loh who held, at that time, the job title of senior manager. Of importance were the assertions that the job descriptions in exhs. "P1A" to "P1F" of pp. 133 to 140 did not give any authority to any staff of Fulcrum, including Lum Sing Fai, the power to approve loans nor the power to extend the tenure of any loans.

(6) The highest designation for an officer in charge of the loan portfolio would be the assistant manager. But when Francis Yong joined Fulcrum he held the post of a manager in charge of the loan portfolio. It was KC Loh that was promoted from manager to senior manager.

(7) That the manager referred to at p. 137 of bundle "A" (exh. "P1C") was in fact the manager as described at p. 135 of bundle "A" (exh. "P1B") and that would be KC Loh who was later promoted as senior manager after Francis Yong joined Fulcrum.

(8) That exh. "P36" as seen at p. 50 of bundle "A" was a draw down memorandum of the loan facility of RM76,219,512 that was granted by Fulcrum to Rahaz Sdn Bhd. That the initials "To: YCS/CMY" and "From: LSF/FY" that appeared at the top portion of exh. "P36" showed that it was an internal memo from Lum Sing Fai and Francis Yong to the treasury department and it was addressed to Yip Chan Sing represented by the initial "YCS" and Miss Chia Meng Yee represented by the initial "CMY".

(9) The importance of exh. "P36" was said to be this. That the approval at the bottom of the page clearly showed that even internally both Lum Sing Fai and Francis Yong had no authority to release a loan that had been pre-approved.

(10) That exh. "P21" as seen at p. 124 of bundle "A" was a letter signed by Francis Yong and addressed to Dato' Samsudin, Mohd Azahari, and Rahaz Sdn Bhd. That exh. "P21" spoke of the status of the term loan facility and that Francis Yong was authorised to communicate with Dato' Samsudin and Rahaz Sdn Bhd in respect of the term loan facility on behalf of Fulcrum.

(11) To a question that at p. 141 of bundle "A" (exhs. "P1 (C), (D), (E), (F)") Francis Yong was not described as being authorised to communicate with the clients of Fulcrum on behalf of Fulcrum in respect of the loans, Lum Sing Fai answered that it must be read with exh. "P1(D)" of p. 138 of bundle "A". In the summary of Francis Yong's job description, it was said that his job responsibility was related to the area of maintenance of account which include credit control. So in performing these responsibilities Francis Yong would, from time to time, communicate with the parties representing the borrowers. The essence of Fulcrum's letter at exh. "P21" of p. 124 of bundle "A" served

to communicate, with precision, the status of the term loan in that there was no approval for the extension of the term loan. Furthermore, in that letter the borrower was asked to pay at least part of the loan prior to the due date and this was part and parcel of credit control. That Fulcrum's letter in exh. "P21" was not an internal document of Fulcrum.

(12) That exh. "P23" at p. 127 of bundle "A" was a letter from Dato' Samsudin to Fulcrum and it was for the attention of Francis Yong. At the second paragraph of exh. "P23" there was reference to a telephone conversation between Dato' Samsudin and Francis Yong. That exh. "P24" of p. 128 of bundle "A" was a letter from Rahaz Sdn Bhd addressed to Fulcrum and it was marked for the attention of Francis Yong. That exh. "P26" of p. 130 of bundle "A" was also a letter from Rahaz Sdn Bhd addressed to Fulcrum and it was also marked for the attention of Francis Yong. Paragraph one of exh. "P26" alluded to the meeting between Francis Yong and Dato' Samsudin and Lum Sing Fai agreed that Fulcrum was aware of this meeting. But Lum Sing Fai was not too sure that in the conduct of the term loan facility the person that Dato' Samsudin or Rahaz Sdn Bhd most frequently dealt with was Francis Yong. However, Lum Sing Fai agreed that Francis Yong was described or carried the title of a manager.

(13) It was put to Lum Sing Fai that Fulcrum had held out and represented to Dato' Samsudin and Rahaz Sdn Bhd that Francis Yong had the authority to deal with both Dato' Samsudin and Rahaz Sdn Bhd in matters relating to the term loan facility that was granted to Rahaz Sdn Bhd but Lum Sing Fai disagreed with such suggestions.

(14) Lum Sing Fai agreed with s. 4.02 of the facility agreement in exh. "P5" as seen at p. 26 of bundle "A" which showed that the total limit of facility was RM76,219.512. But Lum Sing Fai disagreed that out of the total limit of facility, the sum of RM62,500,000 represented the actual principal sum of the loan facility. Lum Sing Fai also disagreed and he said that it was not correct to say that out of the total sum of RM76,219,512, the sum of RM13,719,512 represented the interest charged on the sum of RM62,500,000.

(15) That exh. "P17" of p. 49 of bundle "A" actually stated that Rahaz Sdn Bhd would deduct the sum of RM13,719,512. for interest on the facility amount of RM76,219,512.

(16) Lum Sing Fai agreed with the calculation that the sum of RM13,719,512 together with the sum of RM62,500,000 would give the grand total of RM76,219,512. But Lum Sing Fai disagreed that the sum of RM13,719,512 was the interest for the sum of RM62,500,000.

(17) Lum Sing Fai agreed that under s. 6.01 of the facility agreement in exh. "P5" at p. 31 of bundle "A" that the borrower would pay interest for the facility at the rate of 18% per annum until repayment of the facility.

(18) Lum Sing Fai agreed that under s. 6.01 of the facility agreement in exh. "P5" at p. 31 of bundle "A" it was provided that the interest shall be paid upfront upon the disbursement of the loan facility. He too agreed that the sum of RM13,719,512 constituted the 18% per annum interest that was to be paid

upfront as described in s. 6.01 of the facility agreement. But he disagreed that the interest of 18% paid upfront was interest calculated in advance on the sum of RM62,500,000.

(19) Lum Sing Fai agreed that the statements of accounts found in bundle "A" were prepared by one employee and checked or verified by a different employee. This was to ensure that the figures were correct. He said that the initials that appeared in the statements of accounts as seen at p. 108 to p. 122 of bundle "A" above the words "authorised signatory" belonged to him with the exception of the initial that appeared at p. 115 of bundle "A" above the words "authorised signatory" which belonged to KC Loh.

(20) That exh. "P17" as seen at p. 49 of bundle "A" was a draw down notice from Rahaz Sdn Bhd to Fulcrum. Certain particulars in exh. "P17" were left blank and this included:

(a) the date 9 October 1996;
(b) the figure RM76,219,512 and the date 10 October 1996 in the first paragraph;
(c) the sum of RM13,719,512 in item (1);
(d) the sum of RM62,500,000 in item (2);
(e) the words "Lee Hishammuddin Account Particulars"; and
(f) the words "Arab Malaysian Bank Berhad, Ground Floor, Plaza See Hoy Chan, Jalan Raja Chulan, 52000 Kuala Lumpur, Account no: 00120028251." Lum Sing Fai agreed that all these particulars were subsequently filled in by Fulcrum.

(21) Lum Sing Fai was unable to confirm that a copy of exh. "P17" with the particulars filled therein was never given to any of the defendants. But when pressed further he said that exh. "P17" may not have been given prior to the commencement of the Samsudin Action.

(22) Lum Sing Fai agreed that exh. "P20" as seen at p. 123 of bundle "A" was a request by Rahaz Sdn Bhd for an extension of the term loan facility for a period of six months.

(23) In regard to exh. "P21" as seen at p. 124 of bundle "A", Lum Sing Fai was asked whether he would agree that Francis Yong had conveyed Fulcrum's position in respect of Rahaz Sdn Bhd's request for an extension and he replied in the negative. Lum Sing Fai added that exh. "P21" did not convey the position of Fulcrum; it merely stated that at the last paragraph that the approval for an extension was still pending. That being the case, Lum Sing Fai testified that exh. "P21" actually conveyed the status of the request at that point of time.

(24) That exhibit "P22" as seen at p. 125 of bundle "A" conveyed the position of Fulcrum that if Rahaz Sdn Bhd made the two payments as stipulated within seven days, only then would Fulcrum look into the possibility of agreeing to extend the tenure for the balance. To be precise Lum Sing Fai said that by the second paragraph of exh. "P22", Rahaz Sdn Bhd has to fulfil the terms and conditions prior to the loan extensions. Nevertheless he agreed that the

words "prior to us considering granting the loan extension" did not appear anywhere in exh. "P22".

(25) Lum Sing Fai admitted that not only that the second paragraph of exh. "P27" as seen at p. 131 of bundle "A" say that Fulcrum reminded Rahaz Sdn Bhd that the roll over of the loan was conditional upon full settlement of the interest owing as per Fulcrum's letter of extension dated 10 October 1997 but it conduced to specify "which was duly accepted by yourselves."

(26) Lum Sing Fai did not agree that Fulcrum had stated in exh. "P27" that they had granted a roll over of the loan but conditional upon payment. According to Lum Sing Fai, exh. "P27" was dated 18 November 1997 and it was more than one month after the due date and Fulcrum also reminded Rahaz Sdn Bhd that they had made the request and had agreed to Fulcrum's letter of 10 October 1997 and yet Rahaz Sdn Bhd had still to show that they are prepared to meet the payments that were requested for in the 10 October 1997 letter or even to make the full settlement of the loan. In fact, according to Lum Sing Fai, Fulcrum went on to stipulate that Fulcrum would only consider extending the tenure for the balance.

(27) In regard to exh. "P22" as seen at p. 125 of bundle "A", Lum Sing Fai disagreed that this document sets out an agreement between Fulcrum and Rahaz Sdn Bhd upon these terms:

> that Fulcrum agrees to Rahaz Sdn Bhd's request for an extension of the loan and that the extension is subject to payment of certain sums.

Nevertheless, Lum Sing Fai agreed that the following words:

> before we consider granting you an extension

does not appear anywhere in exh. "P22".

(28) It was put to Lum Sing Fai that there was an agreement to roll over the loan for six months upon the terms as stated in the letter dated 10 October 1997 as per exh. "P22" of p. 125 of bundle "A" and he categorically disagreed.

(29) In relation to exh. "P22" as per p. 125 of bundle "A", Lum Sing Fai agreed that at para. (i) thereof a sum of RM13,719,512 is described as outstanding interest at 18% per annum upfront from 10 October 1996 to 9 October 1997.

(30) In regard to exh. "P23" as seen at p. 127 of bundle "A", Lum Sing Fai was asked as to whether he agreed that exh. "P23" is a letter following a conversation between Francis Yong and Dato' Samsudin requesting for a deferment of payment of interest due to the end of October 1997. Lum Sing Fai replied that he believed that this letter – referring to exh. "P23", follows after the teleconversation with Francis Yong but he was unable to confirm whether the conversation was in regard to the deferment of the payment of interests. Nevertheless Lum Sing Fai agreed that in exh. "P23", Rahaz Sdn Bhd requested to defer the payment of interest due to the end of October 1997. Lum Sing Fai believed that the intention of Rahaz Sdn Bhd in exh. "P23" by using the phrase "interest due" refer to the total sum of RM14,344,512.

(31) Lum Sing Fai agreed that the sum of RM14,344,512 refer to two sums, namely, RM13,719,512 as an outstanding interest and the sum of RM625,000 as an extension fee.

(32) To a question whether Lum Sing Fai would agree that the deferment requested for in exh. "P23" was in reference to the seven days' limit for paying the two sums as alluded to above and as reflected in exh. "P22", he replied that he did not believe so because otherwise the letter would have stipulated a reference to Fulcrum's letter in exh. "P22" instead of the conversation with Francis Yong.

(33) To a question whether Lum Sing Fai would agree that prior to the letter marked as exh. "P23" as seen at p. 127 of bundle "A", the time limit for payment of the sum of RM14,344,512 was within seven days from 10 October 1997, he replied:

> Actually no. I believe P22 refers to a teleconversation on October 9, 1997 which would be prior to our letter in P22 when the dateline was set. As it stands then by right, the entire loan sum was due on 9 October 1997.

(34) Lum Sing Fai was then asked as to whether he would agree that whether it is in reference to the dateline on 9 October 1997 or the dateline within seven days from 10 October 1997, the letter marked as exh. "P23" was in effect a request that both the datelines be to the end of October 1997. In response, Lum Sing Fai said "no" and that he believed that the intention of this letter was to inform Fulcrum that there was a source of fund coming and if Fulcrum could wait till the end of October 1997 some payments can be made and that letter went on at length to inform Fulcrum that that was so because there was expected to be a dividend payment of approximately RM14 million that was forthcoming.

(35) Lum Sing Fai was then asked the following question:

> So, would you agree that in essence this letter (P23 of page 127 of bundle "A") is requesting for time to pay the interest due until the end of October 1997?.

And he replied in this fashion:

> I believe it serves to inform Fulcrum to wait for Dato' Samsudin to come back from South Africa after 20 October 1997 to discuss on how to resolve the loan.

(36) In regard to para. 2 of exh. "P23", Lum Sing Fai was asked as to whether he would agree that this was a request from Rahaz Sdn Bhd to Fulcrum and he replied in the positive. Lum Sing Fai believed that Dato' Samsudin wanted to convey the request from Rahaz Sdn Bhd to Fulcrum to defer payment until the end of October 1997.

(37) It was put to Lum Sing Fai that exh. "P23" contained a request from Rahaz Sdn Bhd to Fulcrum to defer the payment of the interest due to the end of October 1997 and Lum Sing Fai was asked as to whether he would agree with that. He replied that he did not agree.

(38) To a question that Fulcrum had agreed to the request by Rahaz Sdn Bhd for the deferment of interest due to the end of 1997, Lum Sing Fai replied in the negative.

(39) In regard to exh. "P22" as seen at p. 126 of bundle "A", Lum Sing Fai was asked as to whether he would agree that the payment of the sum of RM14,344,512 was to be made within seven days of the letter in exh. "P22" and the reply was in the positive.

(40) Lum Sing Fai was then asked the following question:

> Do you agree that upon expiry of the said seven days from 10 October 1997 i.e. 17 October 1997, Fulcrum did not write to Rahaz Sdn Bhd or Dato' Samsudin for payment of the outstanding interest and extension fee.

The reply was to this effect:

> Yes, we did not write to him to ask for the payment of RM14,344,512.00.

(41) Lum Sing Fai agreed that exh. "P24" as seen at p. 128 of bundle

> "A" was a letter from Rahaz Sdn Bhd to Fulcrum enclosing a cheque for the sum of RM1,500,000.00. He also agreed that exhibit P24 also states that the remaining balance of interest will be paid by the end of October 1997.

(42) In regard to exh. "P24" as seen at p. 128 of bundle "A", Lum Sing Fai agreed that a cheque for the sum of RM1.5 million was enclosed therein as reflected in a cheque number CKB 966202. That cheque can be seen in exh. "P24" at p. 129 of bundle "A". Lum Sing Fai agreed that Fulcrum accepted the payment of RM1.5 million. Lum Sing Fai too agreed that between 21 October 1997 and the end of October 1997, Fulcrum had not written any letter to Rahaz Sdn Bhd demanding for payment of any sum. Lum Sing Fai also agreed that between the end of October 1997 and 18 November 1997, Fulcrum did not write to Rahaz Sdn Bhd for payment of any sum.

(43) It was put to Lum Sing Fai that Fulcrum had agreed to Rahaz Sdn Bhd's request to a variation of the terms stated in Fulcrum's letter dated 10 October 1997 as seen in exh. "P22" of p. 125 of bundle "A". Lum Sing Fai replied in the negative and he said that that was not right. He added that the defendant's loan has been over due and payable immediately after 17 October 1997 when the defendant did not make any payment as stipulated in Fulcrum's letter in exh. "P22" that was dated 10 October 1997. He said that the total sum of RM76,219,512 was due and payable. He further said that the defendant namely Dato' Samsudin had in his letter marked as exh. "P23" told Fulcrum that Rahaz Sdn Bhd will be expecting to receive some dividends payment. That letter too goes on to say that Merbok listings outcome will be known in late October. According to Lum Sing Fai these were the sources of repayment of the loan to Fulcrum. That being the case, he said that Fulcrum did not demand full payment of the loan pending the outcome of these matters.

(44) In regard to exh. "P26" as seen at p. 130 of bundle "A", the first paragraph thereto referred to a meeting between Francis Yong and Dato' Samsudin on 14 November 1997. To a question as to whether Lum Sing Fai would agree that the purpose of this meeting was to discuss the roll over of the balance of the interest, he replied in the negative and he added that he believed that the purpose of this meeting was to find out if Rahaz Sdn Bhd and Dato' Samsudin intended to settle the loan.

(45) To a question whether he would agree that the issue of the roll over would be a part of the issue outstanding to be discussed he said that he believed that more appropriately an indulgence of time would be one of the issues discussed.

(46) Lum Sing Fai was then asked as to whether he would agree that the indulgence was in fact in relation to the issue of the roll over of the loan and his reply went like this:

> I don't believe so because the officer that met Dato' Samsudin has got no authority on any matter regarding the loan and I believe Dato' Samsudin is also well aware of the fact and therefore the purpose of the meeting is more for the officer in charge of the loan to gather sufficient information to recommend our next course of action.

In other words, Lum Sing Fai agreed that Francis Yong had attended the said meeting to discuss the loan facility and related issues.

(47) Lum Sing Fai was then asked the following question:

> Would you now not agree that one of the related issues would be the question of the roll over?

and he answered it in this way:

> Probably but as I was not present at the meeting I can't be certain.

(48) It was put to Lum Sing Fai that at the meeting of 14 November 1992 between Dato' Samsudin and Francis Yong there was an agreement between them that upon payment of the sum of RM6.5 million Fulcrum would roll over the balance interest and principal sum of RM62.5 million until 9 April 1998. The reply by Lum Sing Fai was in the negative and this was what he said:

> No. Certainly not.

(49) It was further put to Lum Sing Fai that at the meeting of 14 November 1992, Francis Yong had nevertheless conveyed the message to Dato' Samsudin of Fulcrum's agreement to roll over the balance interest and principal sum of RM62.5 million until 9 April 1998 upon the payment of the sum of RM6.5 million to Fulcrum. The reply of Lum Sing Fai was like this:

> No. The figure of RM6.5 million, I believe doesn't even exist before the 14.11.97 meeting. So Francis Yong could not have gone to the meeting with the mandate or the authority to agree to roll over the balance of the interest because that figure wouldn't have exist before that date.

(50) In regard to exh. "P27" as seen at p. 131 of bundle "A", Lum Sing Fai was questioned in this way:

> It is stated and would you agree that this letter was written by Fulcrum on the basis that Fulcrum wanted to see whether the two cheques amounting to RM6.5 million would clear or would be honoured?

and he replied in the negative. He said:

> No. The letter was written very specifically to refute the allegations of an agreement in Rahaz's letter dated 18.11.97 on page 130 of bundle "A" – ie, P26. That's the reason why we make it a point to detain Rahaz's despatch staff

long enough to carry this letter (P27) back with him. And we highlighted very specifically that we can only consider Rahaz's request and we also reserve our right as long as the loan facility remains in default.

Lum Sing Fai was questioned again:

Do I understand you to say that P27 is an immediate response to Rahaz's letter of the same date in P26?

and he replied:

Yes, certainly.

(51) Lum Sing Fai was then asked:

Would it be or are you stating that as far as Fulcrum is concerned the response to issues or important issues is prompt?

and he replied:

I think the manner of our response in this instance on 18.11.97 ie, on P27, highlights the anguish and disappointment of the officer handling the matter as the cheques were delivered together with the allegations that agreement had been made with a party that has no authority to do so whatsoever and the fact that a letter deliberately enclosed a meaningful sum of RM6.5 million at the time when the entire RM76,219,512.00 is due and payable.

(52) Lum Sing Fai was then asked the following question:

In other words you are saying that the issue of the roll over was sufficiently important as it relates to a large sum of money represented by the facility and therefore it required you prompt attention and reply.

and he answered it in this way:

I think more accurately again, it is because a large sum of money was involved so any issue would warrant a more prompt attention.

(53) In regard to exh. "P26" as seen at p. 130 of the report, Lum Sing Fai agreed that together with exh. P26 were enclosed two cheques from Rahaz Sdn Bhd, namely, cheque no: PBB 161794 for RM6 million and cheque no: MBB 577537 for RM500,000. Lum Sing Fai also agreed that the plaintiff accepted and banked in these two cheques from Rahaz Sdn Bhd totalling RM6.5 million. He too agreed that these two cheques totalling RM6.5 million were in fact honoured.

(54) In regard to exh. "P27" as seen at p. 131 of bundle "A", Lum Sing Fai was asked this question:

Would you agree that no where in this letter was there a demand for immediate payment or payment within a stipulated time of the balance interest amounting to RM6,344,512.00?

and the reply was:

Yes, because if we had demanded for a repayment it would not have been for the balance of RM6,344,512.00, it would have been the full loan sum less money already received less interest accumulated up to that day but we are unable to do until the cheques are confirmed clear.

(55) Lum Sing Fai agreed that there was no demand in the letter as seen in exh. "P27" at p. 131 of bundle "A" for payment of the alleged total sum claimed by Fulcrum pursuant to the term loan facility.

(56) Lum Sing Fai was also asked this question:

Would you agree that for a period of slightly more than 2 weeks after the two cheques amounting to RM6.5 million was honoured, Fulcrum did not make any demand for payment of any sum?

and he replied in this way:

After refuting the alleged agreement we have given time to Rahaz Sdn Bhd to respond. After that we also seek directions and clearance from our senior manager before we acted. That's why we responded after not hearing from Rahaz, despite that we have disputed the agreement alleged by them.

He continued to say that:

The sum involved is very substantial. Our letter on 18.11.97 on page 131 of bundle "A" – P27, clearly refused any agreement on our part to roll over. In the matter as substantial as this we would also like to see Rahaz would come back to dispute it or otherwise.

(57) Lum Sing Fai was also asked this question:

You said earlier that because the sum involved is large that is why you reverted immediately or promptly on 18.1.97. Is that correct?

and he answered it in this way:

No. What I said was that it was because of the alleged agreement in Rahaz's letter marked as P27 at page 131 of bundle "A" that warranted a response immediately otherwise we would consider other issues affecting our interests in a prompt manner.

(58) The following exchanges then followed:

Q: Would you not agree that the urgency of the matter was made so because the sums involved were large?

A: I believe the urgency of the nature of the issue depends also whether our interest as lender is affected. Some issues may not affect the recovery of the loan and therefore time was not the essence then and we would consider the matter carefully.

Q: Would you agree that in re-viewing the recovery of a loan where the sum involved is large, there is more urgency?

A: Yes.

Q: Would you agree that the sum involved in this claim by Fulcrum is a large sum?

A: Yes.

Q: Do you agree that Fulcrum had in fact agreed to the request by the second defendant (Rahaz) to roll over the balance sum of RM6,344,512.00 together with the principal sum until 9.4.98?

A: No.

Q: Do you agree that after Fulcrum had accepted the sum of RM6.5 million, Fulcrum did not revert to Rahaz to make any demands on Rahaz for approximately 2 weeks?

A: We have actually communicated to Rahaz of the status of the loan via a statement of account dated 30 November 1997 marked as P31A at page 121 of bundle "A" which clearly shows that the loan is overdue and also states the amount outstanding up to that date.

Q: Would you agree that P31A at page 121 of bundle "A" is not a letter of demand for payment?

A: Yes, but it serves to reinforce the status of the loan to the borrower. It will solicit a response of payment if the borrower regards it as important to show its commitment when the loan is already overdue.

(59) It was put to Lum Sing Fai that bearing in mind the promptness of Fulcrum's reply dated 18 November 1997, the letter in "P28" dated 4 December 1997 as seen at p. 132 of bundle "A" was an extremely delayed afterthought. The reply was in the negative.

(60) It was also put to Lum Sing Fai that:

> There was a valid and binding agreement between Fulcrum and Rahaz Sdn Bhd that upon payment of RM6.5 million the balance interest together with the principal sum would be rolled over until 9.4.98 and that no legal action would be taken against Rahaz.

and he ventured an answer in this way:

> There can't possibly be one because Rahaz has never met any of our request for payments as stipulated in our letters and we have under no circumstances accepted any of their proposal or counter proposal.

(61) The cross-examination proceeded further and Lum Sing Fai was asked the following questions:

Q: You agree that by Fulcrum's letter dated 4.12.97, Fulcrum gave notice to Rahaz to pay up the balance interest or come up with a proposal?

A: Yes.

Q: Is it the plaintiff's allegation that Rahaz did not comply with P28 – at page 132 of bundle "A"?

A: Yes.

(62) In regard to exh. "P32" at p. 214 of bundle "A", Lum Sing Fai was questioned in this way:

Q: Would you agree that this letter refers to an alleged failure to comply with the terms of the extension stipulated by Fulcrum in P22 – page 125 of bundle "A"?

A: Yes, it is.

Q: Would you agree that by this same letter, Fulcrum cancelled the term loan facility granted to Rahaz?

A: Yes.

Q: Would you also agree that the plaintiff by P32 of page 214 of bundle "A" demanded payment within 7 days of the sum of RM71,838,012.31 plus interest accruing and notice fee of RM575.00?

A: Yes, that's right.

Q: Would you also agree – see P33 of page 216 of bundle "A", that due to the alleged failure by Rahaz to comply with the letter of demand dated 31.12.97 marked as P32, the plaintiff had by this letter as per P33 demanded payment from Dato' Samsudin as guarantor?

A: Yes.

(63) It was put to Lum Sing Fai that:

> The letters dated 4.11.97 marked as P28, dated 31.12.97 marked as P32, and dated 13.12.98 marked as P33 are in breach of Fulcrum's agreement to roll over the balance interest and the principal sum until 9.4.98 and to withhold legal action against Rahaz.

and he replied:

> No, there was no agreement of this nature whatsoever.

(64) In regard to exh. "P34" as seen at p. 225 of bundle "A", Lum Sing Fai agreed that the words "aforesaid notice" found therein referred to Fulcrum's letter dated 4 December 1997 as seen in exh. "P28" at p. 132 of bundle "A".

Lum Sing Fai was then asked:

Q: Would you agree that by the date of this letter 3 September 1998 (see P34), Fulcrum had already cancelled or purported to cancel the full term facility granted to Rahaz?

A: Yes.

Q: Would you agree that by this letter 3 September 1998 (see P34), Fulcrum had previously demanded repayment of all alleged outstanding sums as at 31.12.97 from Rahaz and Dato' Samsudin?

A: Yes.

Q: Would you also agree that by 3 September 1998 (P34), Fulcrum had already disposed of certain securities held by Fulcrum for the SMG Holdings Ltd shares – the South Africa's shares?

A: Yes, very specifically we disposed off only RM2,477,700.00 SMG shares.

(65) In regard to exh. "P32" as seen at p. 214 of bundle "A", Lum Sing Fai agreed that this was a letter of demand to pay certain sums therein within seven days of that letter.

(66) In regard to exh. "P5" at p. 37 of bundle "A" in particular s. 10.01(b) thereof, Lum Sing Fai was asked:

Q: Would you agree that the alleged failure by Rahaz to reply to Fulcrum's letter in P32 within 7 days would fall under section 10.01 (b) of P5?

A: I would say no. This letter of demand was issued pursuant to section 7.04 of P5 (see page 33 of bundle "A") and was issued after the event of default has taken place.

Q: Would you agree that an alleged failure to comply with the letter of demand issued under section 7.04 of P5 (see page 33 of bundle "A") would possibly fall under an event of default under section 10.01 (b) of P5 (see page 37 of bundle "A")?

A: Yes, it will.

(67) In regard to s. 10.02 of exh. "P5" (see p. 38 of bundle "A"), Lum Sing Fai agreed that upon failure by the borrower to comply with the seven days notice to remedy a breach or alleged breach the lender may under s. 10.02, among other things, cancel the facility.

(68) It was put to Lum Sing Fai that Fulcrum's solicitor's letter dated 31 December 1997 to Rahaz Sdn Bhd marked as exh. "P38" was in breach of the terms of the facility agreement marked as exh. "P5", and he replied in the negative.

(69) In regard to the statement of claim in bundle "C" at p. 14 at paras. 19.1 and 19.2, Lum Sing Fai agreed that the net proceeds of the South African Rand 284,983.35 had been repatriated to Malaysia. And that these proceeds together with the proceeds from the further sales of the SMG Holdings shares that took place after 4 November 1998 as well as the proceeds from the dividends received for the SMG Holdings shares were repatriated together with interests on 10 August 1999.

All these constituted the cross-examinations of Lum Sing Fai. It was a long drawn affair. No stones were left unturned. Lum Sing Fai was then re-examined and he testified that the applicable job title for Francis Yong can be seen at p. 138 of bundle "A" and this would be that of an assistant manager in the field of portfolio management. He too testified that the scope of authority applicable to the assistant manager can be seen at p. 141 of bundle "A". He categorically stated that Francis Yong was expressly prohibited or was not authorised to extend the loan. He too testified that the list of duties and responsibilities and the scope of authority as issued by Fulcrum was strictly observed by the employees of Fulcrum. This was what he said:

Yes, always been observed by every single employee.

It would be ideal, at this juncture, to reproduce the verbatim evidence of Lum Sing Fai under re-examination. It went like this:

Q: In your years of experience as an employee of Fulcrum has any employee exceeded his authority?

A: Never, not throughout my 6 years with Fulcrum.

Q: With reference to Francis Yong, you are aware of any occasion where he has exceeded his authority?

A: No, he has never on any occasion exceeded his authority. Moreover, Francis Yong joined us after spending a few years with a bank and therefore he is very clear on what he can and cannot do and has always been very clear in the performance of his duties.

Q: In this letter P21 dated 6.10.97 written by Francis Yong to Dato' Samsudin, did Francis Yong hold himself out as having the power to extend any loan?

A: No, in fact in paragraph 2 of the letter it clearly says that approval will be from Fulcrum's directors and Tan Sri Dato' Azman Hashim. The last paragraph also emphasises again the final approval for the extension of the loan would certainly have to come from Tan Sri Dato' Azman Hashim and it went on to put on record that this has been conveyed to Encik Azahari, as well.

In regard to exh. "P36" at p. 50 of bundle "A", Lum Sing Fai said that it was a draw down memorandum and the approving authority can be seen at the bottom of the memorandum and it was signed by Jimmy Lim. It was said that Francis Yong's role and that of Lum Sing Fai were only to prepare the memorandum and check its particulars. The initials "JL/SKW's approval" appearing at the bottom of exh. "P36" referred to Jimmy Lim and Soo Kim Wai respectively. In Fulcrum, any loan extension had to be approved by the loan committee which comprised of Soo Kim Wai, Jimmy Lim and Tan Sri Dato' Azman Hashim. Lum Sing Fai was then referred to the facility agreement as seen in exh. "P5" at p. 20 of bundle "A" and he was asked the following questions and he too rendered the following answers:

Q: Can you tell the court what is the loan facility amount and the section that stipulates that?

A: The facility amount is stipulated in section 4.02 of the facility agreement which is at page 26 of bundle "A" and it clearly states that the facility shall be RM76,219,512.00.

Q: What was the status of the facility as stated in section 4.03?

A: The purpose is to finance up to RM62,500,000.00 of the balance of the purchase price of the sale and purchase agreement between Bafana Holding Ltd and Landmarks Hotel & Realty Sdn Bhd.

Q: Is the sale and purchase agreement defined?

A: Yes. It is defined as the sale and purchase agreement between Landmarks Hotel & Realty Sdn Bhd and Bafana Holding Ltd.

Q: What is the difference between the total facility of RM76,219,512.00 and the sum of RM62,500,000.00?

A: The difference is RM13,719,512.00 and this represents interest of 18% per annum on RM76,219,512.00 for a period of one year.

Q: What is interest at 18% per annum for 12 months on the sum of RM62,500,000.00?

A: That would be RM11,250,000.00.

Q: Why did Fulcrum finance Rahaz the interest that is chargeable on RM76,219,512.00?

A: This is because Rahaz do not have funds to service interest and therefore requested us to finance the interest portion of the loan.

In regard to the draw down notice in exh. "P17" at p. 49 of bundle "A", Lum Sing Fai re-confirmed that the draw down notice was in accordance with Appendix "A" to exh. "P5" as seen at p. 48 of bundle "A". He testified that in accordance with the facility agreement, Rahaz Sdn Bhd executed the draw down notice that appeared in exh. "P17". The particulars of exh. "P17" at items (1) and (2) were left blank

when Rahaz Sdn Bhd handed over the draw down notice and they were exactly as seen in Appendix "A" of the facility agreement at p. 48 of exh. "P5". Lum Sing Fai was then asked:

Q: The particulars as to the facility RM76,219,512.00 and the interest at RM13,719,512.00 and the purpose of the loan at RM62,500,000.00 were they in accordance with the terms and conditions entered into between Fulcrum and Rahaz?

A: Yes, the facility amount of RM76,219,512.00 is in accordance to section 4.02 of the facility agreement and the sum of RM13,719,512.00 being the interest portion for the facility is reflected in section 6.01 of the facility agreement. Whereas the payee particulars was filled in in accordance with section 4.03 and section 4.07 of the facility agreement.

Q: The particulars of the payee i.e. Messrs Lee Hishammuddin and the bank account number were they in accordance with the instructions given by Rahaz?

A: Yes, it was.

Q: Can you confirm that in P22 the last paragraph you said that unless the payment of RM14,344,512.00 are paid within 7 days from the date of this letter, this offer lapses?

A: I confirm that.

Q: When did this offer lapse?

A: This date line would have lapsed on 17.10.97.

Q: Did Rahaz pay to Fulcrum RM14,344,512.00 on or before 17.10.97?

A: No. Rahaz did not pay us any sum of money on or before 17.10.97.

Q: Did Rahaz complete the bottom portion at page 126 of bundle 'A' and return it to Fulcrum?

A: No.

Q: Where was Dato' Samsudin when he wrote P23?

A: The letter came from South Africa.

Q: Why do you say that?

A: It starts off by stating:

Greetings from South Africa

and the fax heading shows that it was faxed out as SMG Corporation (see bottom of page together with the fax number).

Q: Would the printed address at the bottom of page 127 of bundle 'A' c/o Samrand Development Holdings Ltd also confirm that?

A: Yes.

Q: Do you know what is the time difference between South Africa and Malaysia?

A: I believe they are about 6 hours behind us.

Q: P23 which is dated 11 October 1997, does it make any reference to Fulcrum's letter of 10 October 1997 to Rahaz Sdn Bhd (P22)?

A: Not at all.

Q: P23 written by Dato' Samsudin, what is it pursuant or in response to?

A: This letter in fact refers to the telephone conversation on the 9th of October 1997 between Francis Yong and Dato' Samsudin.

In reference to exh. "P24" as seen at p. 128 of bundle "A", Lum Sing Fai was asked this question:

Q: Rahaz had tendered a cheque post dated to 22 October 1997 for a sum of RM1.5 million (see page 129 of bundle 'A'), did Fulcrum take this payment?

A: Yes, Fulcrum took this payment on the basis that the entire facility of RM76,219,512.00 is already overdue since 10.10.97 and up to 21.10.97 Rahaz owes us RM76,219,512.00 together with interest accruing since 10.10.97.

Further exchanges took place in this manner:

Q: Can you tell the court whether Fulcrum had at any time varied the terms or contents of its letter dated 10 October 1997 as per P22 of page 125 of bundle 'A'?

A: No, we have not.

Q: To a question in cross-examination whether Fulcrum demanded payment from Rahaz you had answered No. Now can you tell Y.A. whether under the terms of the facility agreement a demand is required?

A: Section 10.01 (a) of the facility agreement which is on page 37 of bundle 'A' clearly states that the borrower has defaulted if the borrower shall fail to pay after the loan had become due whether formally demanded or not.

Q: When did the loan become due in this case?

A: The entire loan became due on the close of business on the 9th of October 1997.

Q: Would that be the expiry of the tenure of the loan which is 12 months from the date of the draw down?

A: Yes, it is on expiry of the 12 months from the date of the draw down which was on 10.10.96.

Q: Can you confirm that section 10.01 of the facility agreement provides for 14 events of defaults and that the first event of default of non-payment after the loan becomes due with or without a formal demand?

A: Yes, that is right.

Q: After your Fulcrum's letter dated 10.10.97 (P22-page 125 of bundle 'A'), do you confirm that that letter lapsed on 17.10.97 and after that the next letter dated 18.11.97 (P27 at page 131 of bundle 'A')?

A: Yes.

Q: P27 contained your immediate response to Rahaz's letter of the same date, is that correct?

A: Yes, that is right.

Q: P27 at page 131 of bundle 'A', it was co-signed by Francis Yong?

A: Yes, that is right.

Q: What was the purpose of this letter (P27)?

A: The purpose of the letter (P27) is to refute and deny an alleged agreement stated in Rahaz's letter of 18 November 1997 that the balance payable will be rolled over for a period of 6 months and that no legal action is to be taken. Our letter specifically denies both the alleged agreement.

Q: Did you (Fulcrum) take Rahaz's payment of RM6.5 million?

A: We took the RM6.5 million because Rahaz has been in default and continues to be in default of repayment of the entire loan of RM76,219,512.00 together with interest accruing from 10 October 1997.

Q: When you wrote P27 denying the agreement and taking the payment of RM6.5 million, did Rahaz revert to protect or deny the contents of Fulcrum's letter in P27?

A: No, despite that we ensured that our reply delivered back to Rahaz by their own despatch staff on the same day and despite the seriousness of the issues involved Rahaz never responded to our letter and has never attempted to either stop payment of the cheques nor attempt to seek a refund of the RM6.5 million.

Q: Between 18.11.97 and 4.12.97 did Rahaz write to Fulcrum?

A: No, Rahaz did not.

Q: Did Rahaz respond to this letter dated 4.12.97 (P28)?

A: No, Rahaz did not.

Q: Was the document (P31A) sent to Rahaz?

A: Yes.

Q: Are the particulars therein in P31A correct?

A: Yes they are correct.

Now, the re-examination of Lum Sing Fai was indeed very thorough. It was meticulously undertaken and it showed that the issue of the roll over of the loan would indeed decide the whole case once and for all. Lord Tenterdon aptly said in the *Queen*'s Case [1820] 2 Brod. & B. 284, 297:

> I think that counsel has a right upon re-examination to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and also of the motive by which the witness was induced to use those expressions; but I think he has no right to go further, and to introduce matter new itself and not wanted for the purpose of explaining either the expressions or the motives of the witness.

Basically, the object of re-examination is to give an opportunity to reconcile the discrepancies between the statements in examination-in-chief and cross-examination or to explain any statement inadvertently made in cross-examination or even to remove any ambiguity on the evidence elicited by cross-examination. However, no new matters may be introduced by way of re-examination without the leave of the court. In *Yeak Chie Chai v. Gan Bee Aik* [1984] 1 MLJ 305, 306, Shankar J (as he then was) remarked:

> In this case there was no cross-examination. Therefore it follows that there should have been no re-examination.

Whitley Ag. CJ in *Public Prosecutor v. Lee Pak* [1937] MLJ 265, 266 succinctly said:

> It frequently happens that a cleverly conducted cross-examination leaves a totally wrong impression of the evidence upon the mind of the court, which wrong impression is completely removed by a few pertinent questions in re-examination.

Reverting back to the mainstream of the case, Lum Sing Fai was then re-examined along these lines:

Q: Do you confirm that the statement of account dated 30.11.97 (P31A) stated at the bottom under 'note' the words appearing therein read:

> This loan is overdue on 9.10.97. Late interest at 18% per annum shall be calculated on daily basis,

and that it further stated that:

> All items and balances shown above will be considered correct unless we are notified of any discrepancy within 14 days,

are these correct?

A: Yes, that's right.

Q: Exhibit P31B at page 122 of bundle 'A' – another statement of account dated 31.12.97 carried the same note like P31A was also sent to Rahaz?

A: Yes, that's right.

Q: Was the content of P31B disputed by Rahaz?

A: No.

Contents of P31A too was not disputed by Rahaz. Both the contents of P31A and P31B were never disputed by Rahaz.

Q: Can you re-confirm what you said in cross-examination that the demand issued by your solicitors at page 214 of bundle 'A' (P32) to Rahaz and at page 216 of bundle 'A' (P33) to Dato' Samsudin and P34 also to Rahaz were in accordance with section 7.04 of the facility agreement in view of the event of default under section 10.01 (a) of the facility agreement and not under section 10.01 (b) of the facility agreement?

A: Yes, I confirm that.

Q: Did Fulcrum at any time agree to extend the loan facility to Rahaz for 6 months expiring on 9.4.98?

A: No, we have never extended the loan facility at all.

That constituted the whole evidence of Lum Sing Fai. It was very thorough and I have endeavoured to reproduce them in verbatim. The plaintiff also called to the stand to testify four other witnesses and they were:

(a) Francis Yong Wing Kheong (PW2);

(b) Ng Eng Kiat (PW3);

(c) Dato' Jimmy Lim Thaw Chay (PW4); and

(d) Loh Kam Chuin (PW5).

While the defendant, on the other hand, only called one witness to the stand and that was Mohd Azahari bin Abu Kassim (DW1) (hereinafter referred to as "Azahari").

The Session On 4 December 2000

After Azahari had testified, Mr. TS Lim for the defendants in the Samsudin Action and the Rahaz Action addressed this court. This was what he said:

> We have no other witnesses to call except Dato' Samsudin. We only have one last witness to call and that is Dato' Samsudin himself. But he is indisposed and this is his medical report/certificate (show to court). He will be available in the middle of January 2001.

This provoked a response by Mr. M. Pathmanathan, the learned counsel for the plaintiffs in the Samsudin Action and the Rahaz Action, and this was what he said:

> I urged this court to reject this excuse not to attend court. Firstly, the dates that were set in September 2000 for the preliminary issue, namely, 25, 26, 27, 28 and 29 September 2000 were objected to by Dato' Samsudin on the grounds that those dates were not suitable. And that the original dates of 20.11.2000 to 24.11.2000 and 27.11.2000 to 30.11.2000 were the dates suitable to Dato' Samsudin. At page 97 of the grounds of judgment of Y.A., Y.A. has stated that DR John had craved the indulgence of the court to hear the preliminary issue in November 2000 and not in September 2000. So from 20.11.2000 onwards Dato' Samsudin should be in the country particularly so since he is the defendant in the S5 suit (the Samsudin Action) and the case for the defence was opened only on 23.11.2000. Dato' Samsudin ought to have been the first defence witness to take the stand. Instead the defence was not even prepared to undertake that he would appear as a witness.
>
> Now, we have before us medical certificates conclusively proving that throughout this period from 20.11.2000 he was in South Africa and not in Malaysia and he only saw his doctor on 25 November 2000 and this goes to show that the whole conduct lack of *bona fide* and Dato' Samsudin had no intention whatsoever of taking the stand and instead would go to any length to avoid giving evidence under oath and being cross-examined.
>
> It appears that on 1.12.2000 Dato' Samsudin was scheduled to undergo a colonoscopy and gastroscopy and it is not a surgery. It is a medical appointment to undergo medical examination and not surgery. I say this on the basis of a personal knowledge. A person undergoing colonoscopy walks out of the doctor's clinic within 2 hours. I myself had undergone this annually and this year I was scheduled in February 2000 and had to put it off up to now.
>
> With the greatest of respect, I would not object to someone who is medically unfit and in the circumstances I see a desperate effort to avoid court attendance by Dato' Samsudin. YA had informed my learned friend on 30.11.2000 that this case would proceed every day of this week which was ample notice to Dato' Samsudin to be present. It appears that we have all made ourselves available in spite of other engagements. But the most important person to whom this case matters most is doing just the opposite. I urged Y.A. to proceed with the case. Either the defence proceeds with its defence or proceed with its submission.

Mr. TS Lim for the defendants then responded and this was his response:

> I believe the medical certificates are by themselves consistent. See the medical certificate dated 28.11.2000 where the doctor wants to investigate Dato' Samsudin – quite clear. It does not mean that a colonoscopy is to be used for only one type of complaint. What we have are medical certificates certifying that he is medically unfit to travel for 7 weeks with effect from 25.11.2000.
>
> I have photostated copies of Dato' Samsudin's passport. At page 43 it shows that on 21 November 2000 he was in Kuala Lumpur. At page 40 it shows that on 22.11.2000 he left Kuala Lumpur and at page 12 of the passport it shows that he was in Singapore and he returned to Kuala Lumpur on 23 November 2000 as seen at page 43 of the passport.
>
> There is a flight schedule from Kris International which shows that on 25.11.2000 Dato' Samsudin left for Johannesburg at 1.05 a.m. because his grandmother in Johannesburg taken ill (see the fax from Debbie Butler). He is supposed to return to Kuala Lumpur on 28.11.2000 at 6.20 p.m. for the reasons stated in the medical certificate.

Dato' Samsudin was in Kuala Lumpur on 21 November 2000 and between 23 November 2000 to 24 November 2000 he was also in Kuala Lumpur. These were the dates of the court sessions. On 24 November 2000, DW1 took the witness stand.

I will not give an undertaking that Dato' Samsudin will come to court in January 2001 to give his evidence.

In the event Dato' Samsudin is not present in January 2001, I propose that parties proceed to submission straight away provided that there are no good reasons for Dato' Samsudin not to appear in court.

Mr. M. Pathmanathan replied and this was what he said:

I believe the passport of Dato' Samsudin and the fax from Debbie Butler show that Dato' Samsudin is not at a disability. He is in fact avoiding the court. Dato' Samsudin is here and there and everywhere and not where he should be i.e. this court.

He was fit to fly to Kuala Lumpur and when he was in Kuala Lumpur he showed disregard to this Honourable Court by not attending court when he is the defendant in S5. In fact, he owns practically all the shares in Rahaz and hence in the D4 action he is practically the defendant also.

Instead on 22.11.2000 he was fit and able to fly to Singapore and back and then he received a fax about the grandmom's fall from the wheel chair.

On 1.05 a.m. on 25.11.2000 he left Malaysia for Johannesburg to see the grandmom but instead he went to see a doctor in South Africa to obtain medical certificates in order to avoid coming to Malaysia for 7 weeks. Obviously he never intended to keep his itinerary to come back to Kuala Lumpur on 28.11.2000 at 6.20 a.m. (see Kris International flight schedule). It is reasonable to conclude that he never intended to return to Kuala Lumpur and it is also reasonable to conclude that he never intended to take the stand in these proceedings. This is borne out by the fact that whenever evidence is given about one witness hearing from another witness, such evidence is not rejected on the undertaking by the other party to call the other witness. In this case, the defence was never prepared to give that undertaking. The most crucial aspect of this case – i.e. Dato' Samsudin's meeting with Francis Yong on 14.11.97.

I urged this court not to accede to these requests. Dato' Samsudin left the country not on account of his medical condition but on account of the grandmom – an unidentified grandmom. We have availed ourselves during the fasting month particularly Y.A. and Asmet Nasaruddin and the most important person that should be here and should be assisting this court on what had transpired on 14.11.97 is not present in court.

If the colonoscopy which Dato' Samsudin had to take was in fact taken on 1.12.2000 he would be here today. Colonoscopy is not a surgery. It is an investigation. He chose to do it during the course of this proceeding. He doesn't say that it is imperative or a life threatening procedure that it cannot be postponed. I say this from experience after removing polyps which was on Thaipusam day, I then climbed up Batu Caves. It is a trivial investigation. Not life threatening. Nothing urgent. On 1.12.2000 he could have returned to Malaysia.

Why on earth does someone need 7 weeks to recuperate from colonoscopy investigation? This court has given firm directives to the defence that this case will proceed and I urge this court to proceed and to tell Dato' Samsudin to keep his word.

If Dato' Samsudin is not available in January 2001, it will be a waste of time. Dato' Samsudin's oral testimony should be recorded by YA today. I urge YA to reject the defence application for a postponement.

In response, Mr. TS Lim said:

> The fact that Dato' Samsudin was examined on 25.11.00 and on that day he also saw grandmom does not show bad faith. It is not unusual for someone to seek medical attention if he has physical complaint regardless of the fact that he was originally in hospital for something else. The documents show that the gastroscopy and colonoscopy were to ascertain the source of his illness. In this respect, he has been certified unfit to travel for 7 weeks. No credible challenge to the certification. The right of a defendant to give evidence on his own behalf cannot lightly be thrown away by general accusations which are unsubstantiated. Is it right and proper to expect someone who has undergone some surgical operation to travel during the fasting month?
>
> Order 39, rule 2 of the RHC states that evidence may be taken of a witness out of jurisdiction by way of a deposition. If the plaintiff is concerned about the delay then such evidence may well be taken. Indeed the plaintiffs are seeking to exclude Dato' Samsudin's evidence strongly indicates that they wish to close the case without evidence unfavourable to them being taken. The right of the defendant to give oral evidence is a serious matter to consider.
>
> I propose:
>
> (1) for trial to proceed after the middle of January 2001.
>
> (2) if Dato' Samsudin does not attend for no good reasons, parties are to submit immediately.

Mr. M. Pathmanathan then responded and he submitted in this way:

> It is now our 22nd day of hearing. Nobody is excluding Dato' Samsudin's evidence. We are all clamouring for his evidence. And he, more than anybody else, is a crucial witness – his evidence is crucial to this case. He is electing or chooses to avoid trial. He is not like President Pinochet who suffers from ill health or like ex-President Suharto who is also in ill health. Dato' Samsudin is jetting about and he was in Kuala Lumpur on 21.11.2000, 23.11.2000 and 24.11.2000.
>
> YA will recall when this case was fixed for hearing in September 2000, DR John tendered documentary evidence to show that Dato' Samsudin was not available. The list of excuses cannot be exhausted.
>
> The valuable time which this court had made to fix this case for hearing between 4.12.2000 to 8.12.2000 and to the possibility of fixing other cases but it was not done in order to accommodate the hearing of this case should be good pointers for YA not to accede to the request for an adjournment. I too, in the interim period, have postponed 3 cases in order to handle this case.

A short response came from Mr. TS Lim and this was what he said:

> I leave entirely to YA's discretion. I believe the proposals I advanced are reasonable.

Having heard the submissions of counsel for both sides, I then made the following rulings:

> On 21.11.00, 23.11.00 and on 24.11.00 when Dato' Samsudin was in Kuala Lumpur he did not attend court even though he is cited as a party in the S5 suit.
>
> The learned counsel for Dato' Samsudin refused to give an undertaking that Dato' Samsudin would turn up in court in the middle of January 2001.
>
> The medical certificates did not say that Dato' Samsudin would undergo surgery. It uses the word 'investigation'.

The trial has entered its 22nd day today. A long protracted trial and not even once did Dato' Samsudin turn up in court even though he is cited as a defendant in the S5 suit.

In the circumstances, for the reasons stipulated and for other reasons which will be elaborated in the course of writing this judgment, I rule that the defendants' case to proceed with or without Dato' Samsudin. Mr. T.S. Lim is invited to submit.

In response, Mr. TS Lim said:

I have no submissions to make. I leave the matter to YA.

I then invited Mr. M. Pathmanathan to submit and he willingly did so. The submissions of Mr. M. Pathmanathan went into the heart of the matter and I must be forgiven for reproducing his excellent submissions. He submitted in this way:

The only witness called by the defence is DW1 (referring to Azahari) who was not present at the meeting between Dato' Samsudin and Francis Yong on 14.11.1997. The only document or evidence that the defence relies upon is exhibit P26 as seen at page 130 of bundle 'A' – a letter written by DW1 (referring to Azahari) dated 18.11.97 based on what Dato' Samsudin told DW1 (referring to Azahari).

The two points of agreement alleged in that letter (referring to exhibit P26) were immediately denied by the plaintiffs by their letter of the same date which is at page 131 of bundle '1A' – P27. It is of utmost importance that the defendants – neither Rahaz nor Dato' Samsudin ever refuted or denied the contents of P27. When any reasonable person who has paid a sum of RM6.5 million as a condition to roll over the loan for 6 months he would apply to stay legal action which he would naturally have done as a matter of immediate urgency.

This in itself puts paid to the defence contention that such an extension was in fact granted. The plaintiffs had by their letters of 6 October 1997 (P21) and 10 October 1997 (P22) required 2 conditions precedent to be satisfied in order for the request by the defendants for a roll over of the term loan facility to be considered.

The two conditions were for the repayment of part of the term loan facility amounting to RM13,719,512.00 which represented the interest portion of the loan and a further sum of RM625,000.00 which represented an extension fee of 1% of the sum of RM62.5 million. The total sum which Rahaz had to pay to fulfil the conditions prior to giving a roll over was RM14,344,512.00. The defendant paid only a sum of RM8 million made up of RM1.5 million paid on 21 October 1997 (P24) and RM6.5 million on 18.11.97 (P26) leaving a sum of RM6,344,512.00 outstanding and unpaid. The plaintiffs made it very clear by their letters P27 dated 18.11.97 and P28 dated 4.12.97 that this sum of RM6,344,512.00 must be paid to fulfil the 2 conditions precedent before a roll over of the part of the loan of RM62.5 million can be given.

In spite of several datelines given by the plaintiffs, the first one being 9 October 1997 (see P21 dated 9 Oct 97), the second on 17 October 1997 (see P22 dated 10 Oct 97) and finally on 15 November 97 (see D38 dated 4 November 1997), the defendants were unable to fulfil the conditions precedent and hence the question of having given an extension of time does not arise.

DW1 (referring to Azahari) stated in no uncertain terms that the full sum of RM14,344,512.00 must be paid by the defendant to entitle them to an extension of time of 6 months.

DW1 (referring to Azahari) further agreed that the defendants at all times knew and understood that the sum of RM13,719,512.00 represented the interest portion of the loan.

DW1 (referring to Azahari) further confirmed that the defendants knew and understood that the plaintiffs were only prepared to consider granting an extension of part of the loan amounting to RM62.5 million.

DW1 (referring to Azahari) also confirmed that this was consistent with section 4.06 of the facility agreement (P5) which gave the plaintiffs the discretion to extend the whole or only part of the facility.

DW1 (referring to Azahari) further confirmed that the imposition of RM625,000.00 as a 1% extension fee on the RM62.5 million was permitted by section 4.06 of the facility agreement and section 7.02 thereof.

In the circumstances, there is no dispute on the imposition of RM625,000.00 as a processing fee by Fulcrum towards having the funds available and ready in the event Rahaz fulfilled the conditions precedent.

There is no dispute whatsoever that the loan facility was made up of 2 tranches of RM62.5 million and RM13,719,512.00. There is no dispute whatsoever that the total sums of both these figures made up the facility of RM76,219,512.00.

No dispute also that RM13,719,512.00 was disbursed upfront to the defendants as upfront interest payment for the entire loan period.

The facility agreement is clear that the interest is computed on the full facility of RM76,219,512.00 and not RM62.5 million.

All the statements of accounts were sent to both Rahaz and Dato' Samsudin i.e. from 31 October 1996 to 31 December 1997 i.e. P19A to P19L and P30, P31A and P31B.

These statements of accounts were never disputed nor challenged. It is in DW1's evidence (referring to Azahari) that they are indeed correct and DW1 (referring to Azahari) is a qualified accountant.

DW1 (referring to Azahari) further confirmed that the statement, in each and every one statement of account, that all items and balances shown will be considered as correct unless Fulcrum is notified of any discrepancy within 14 days is valid and binding in accordance with the terms and conditions of the facility agreement.

Section 11.15 of the facility agreement which provides that a statement by the lender to the borrower by any of its officers shall be conclusive evidence of the indebtedness so stated and such amount is in fact due and payable and binding on the borrower save and except for any manifest error or where fraud is proven.

DW1 (referring to Azahari) admitted to the correctness and accuracy of these statements and to my specific question this morning he admitted that P67 is correct and consistent with P31B of page 122 of bundle 'A' save and except further interests computed from 1.1.98 to 31.10.2000 and after taking into account the various payments received by Fulcrum from the proceeds of sale of the SMG shares in the Johannesburg stock exchange and the dividends received in respect of the Merbok shares.

DW1 (referring to Azahari) has confirmed under oath that his trust and confidence in the words of Dato' Samsudin were misplaced as Dato' Samsudin has recklessly exposed him to a contempt proceeding with regard to the Syariah High Court proceedings vide the order in P68.

In DW1's (referring to Azahari) own words: If Dato' Samsudin's words cannot be trusted then the reasonable inference to draw is that the contents of the letter in P26 cannot be relied on as stating the truth in particular reference to paragraphs 3 and 4 thereof.

The plaintiffs have clearly proved beyond any doubt that they never agreed to extend or roll over the facility for a further 6 months until 9.4.1998. They have clearly proven their case that is a condition precedent must be met before they would consider

granting an extension. The court had the benefit of hearing and assessing the plaintiffs' witnesses including PW2 – Francis Yong, who was personally present at the meeting with Dato' Samsudin on 14.11.97. My respectful submission is that Francis Yong's evidence was forthright and honest and he used strong words to describe his reaction to the defendants' letter dated 18.11.97 (P26).

Francis Yong said he was disgusted at the way Dato' Samsudin put words which were never agreed to. Francis Yong had given evidence which was corroborated by PW1 – Lum Sing Fai, and K.C. Loh – Loh Kam Chuin (PW5), that the one thing all the employees of Fulcrum are clear about is in regard to their authority and Francis Yong was an officer in the lower scale below PW1 (Lum Sing Fai) and PW5 (Loh Kam Chuin) and none of them had the authority to extend the loan. Hence, inconceivable that Francis Yong would have or could have consented to roll over the facility for 6 months.

DW1 (referring to Azahari) further confirmed under cross-examination that it was clear and evident from P21 – page 124 of bundle "A", that the authority to grant approvals for extensions rest with the directors of Fulcrum and Francis Yong was not a director.

Whilst the pleadings only referred to a meeting between Dato' Samsudin and Francis Yong on 14.11.97 as the date and occasion when an alleged roll over was agreed to, the defence nevertheless sought to suggest that there was yet another telephone conversation between an MD (Managing Director) of Fulcrum and Dato' Samsudin on 17.11.97 where such an agreement to an extension of the loan was reached. The plaintiffs' answers are:

(1) it is outside the scope of the pleadings and hence inadmissible; and
(2) DW1 (referring to Azahari) confirmed under cross-examination that he did not know who the MD (Managing Director) of Fulcrum was.

And when DW1 (referring to Azahari) was put that Dato' Jimmy Lim (referring to PW4 – Dato' Jimmy Lim Thaw Chay) was not the MD (Managing Director) of Fulcrum, DW1 (referring to Azahari) said that he did not know.

On 4.12.97 (P28 – page 132 of bundle 'A') the plaintiffs wrote to Rahaz giving them a final 7 days to come with an acceptable proposal.

It is common ground that there is no response to the final 7 days' ultimatum. On the expiry of the 7 days, the external auditors of the plaintiffs Messrs Salleh Leong Azlan & Co issued a certificate of an event of default as per P29 – page 212 of bundle 'A', which was a condition required under the security document to sell the shares that had been pledged to Fulcrum.

PW3's evidence – Ng Eng Kiat, clear and forthright. He had examined all the relevant documents and gave his professional opinion and certified an event of default.

Based on that certification, the plaintiffs commenced selling the SMG Holdings Ltd shares that had been pledged. The evidence of PW5 (Loh Kam Chuin) on the proceeds of the sale of these shares amounting to RM3,243,591.81 and the dividends from Merbok amounting to RM540,000.00 and RM1,799,000.00 were not challenged by the defence.

The statements of the plaintiffs dated 31 October 2000 (P67) are not disputed and in the words of DW1 (referring to Azahari) 'are correct and a true statement of the accounts between Fulcrum and Rahaz' save and except for what had transpired between Dato' Samsudin and Francis Yong on 18.11.97 to which this witness (DW1) was not a party.

In the premises, the evidence before this court is overwhelming and the compelling conclusion was that there was no agreement reached between the plaintiffs and the defendants to a roll over of the term loan facility dated 9 October 1996 for a further 6 months until 9.4.98. *Guan Teik Sdn Bhd v. Haji Mohd Noor bin Haji Yakob & Ors* [2000] 4 CLJ 324 C.A., the decision of Siti Norma Yaacob JCA.

The contemporaneous documents which we have would be P26 – page 130 of bundle 'A', and P27 – page 131 of bundle 'A'. These are the 2 contemporaneous documents.

I submit that looking at P27, Rahaz ought to have immediately replied to Fulcrum denying the contents of P27 and asking for a refund of RM6.5 million that they had paid.

P27 was never denied and it goes to show the truth of the contents of P27.

If not then YA at the latest on 4.12.97 when the defendants received P28 – page 132 of bundle 'A', at least by then all the shares that were pledged were at risk of being liquidated and Rahaz would have protested vehemently and yet there was not even a whimper.

I urge YA to consider this against the refusal of Dato' Samsudin to either be present or to give evidence on this crucial piece of evidence which turns entirely on his evidence as to what had transpired on 14.11.97.

I urge YA to draw an adverse inference under section 114 (g) of the Evidence Act, 1950 – no other inference that can be drawn from Dato' Samsudin's conduct. Time and again, Dato' Samsudin did not attend court.

In the final analysis we do not have any evidence to support the defendants' contention.

In framing the preliminary issue which was on 23 August 2000 and 25 August 2000 several agreements were reached:

(1) It was agreed as to what the preliminary issue was.
(2) It was also agreed what would be the consequence of the preliminary issue being answered in the negative.

If in the negative as per YA's judgment – it would decide the whole case once and for all and that it would put paid to the defence and counterclaim.

Order 42, rule 8 (4) of the RHC – and I accordingly submit that this order made by YA on 25 August 2000 and having read YA's judgment – I verily believe that it be in these terms.

I now extend a copy of YA's judgment to Mr. T.S. Lim.

The notes of evidence would show that Mr. TS Lim confirmed receiving my written judgment. Mr. M. Pathmanathan then continued:

Page 96 of YA's judgment supports the first part of the draft order now shown to YA.

Page 96 of YA's judgment, page 145 and page 146 of YA's judgment would support the second part of the draft order.

At page 106 of YA's judgment would support the third part of the draft order.

I am advised by Mr. M.Y. Goh that Mr. T.S. Lim had acceded that if the preliminary issue is decided in the negative then the Defence and Counterclaim would fail.

Mr. TS Lim responded favourably and he said:

I believe I did say it in open court.

Mr. M. Pathmanathan then continued:

> In the premises, I seek YA's indulgence to approve the draft order and the order as approved must be consistent with the judgment of YA.

Mr. T.S. Lim responded and he said:

> This is most unusual. We had drawn up a draft order and forwarded it to Messrs Sri Ram & Co and Messrs Iza Ng Yeoh & Kit sometime last month. That draft order did not contain the words `Dengan Persetujuan'. YA's judgment dated 26 October 2000 and we sent the draft order before receiving YA's written judgment.

Mr. M. Pathmanathan also responded and this was what he said:

> I wish to pursue the matter. Order 42 rule 8 (4) of the RHC gives YA the power to determine the judgment or order which YA had made.

Mr. TS Lim then relented and he said:

> YA may determine the order under Order 42 rule 8(4) of the RHC. I agree YA has the power to determine and rule on the draft order submitted by Mr. Pathmanathan.

Now, O. 42 r. 8(4) of the Rules of the High Court 1980 ("RHC") states as follows:

> Every judgment or order shall be settled by the Registrar, but in the case of a judgment or order made by a Judge, any party may require the matter in dispute to be referred to the Judge for his determination.

and it gives the power to me to determine the judgment or order which I had made (see *"Civil Procedure"* by Jeffrey Pinsler at page 725). I then made the following rulings:

> I determine and rule that the draft as submitted to me by Mr. M. Pathmanathan reflect the order of this court dated 25 August 2000.
>
> I now sign/initial the draft order in the Bahasa Malaysia and in the English versions and it is shown to Mr. M. Pathmanathan and Mr. T.S. Lim.

Mr. M. Pathmanathan took the cue and he said:

> In the premises based on the evidence as recorded by this court in the trial of the preliminary issue I pray that the preliminary issue be decided in the negative. And consequently, the Counter Claims by the defendants in the S5 and D4 actions be dismissed with costs. And judgment be entered for the plaintiffs against Dato' Samsudin in the S5 action and against Rahaz in the D4 action and based on the statements of accounts dated 3.10.00 (P67) in the sum of RM102,149,359.69 together with interest on RM70,380,272.95 at 18% per annum from 1.11.2000 until realisation and the proceeds of the sale of the Merbok Hilir shares to Kilang Bumi Aluminium Sdn Bhd pursuant to order of court dated 22 August 2000 amounting to RM67,275,000.00 together with the interest earned thereon be set off against the judgment sum of RM102,149,359.69.
>
> Further I too pray for costs on a full indemnity basis as provided in the facility agreement. That is all.

I then adjourned the case to the next day, namely, on 5 December 2000 to enable Mr. TS Lim to reply. It was recorded in the notes of evidence that Mr. TS Lim was required to submit on the next day, namely, on 5 December 2000.

The Session On 5 December 2000

Mr. M. Pathmanathan wasted no time and he submitted as follows:

> It is for the defendants to reply to my closing submission today, YA.

I then invited the defendants to submit. YM Raja Aziz Addruse who acted for the defendants in the Samsudin Action and the Rahaz Action proceeded to submit and this was what he said:

> I have not been with this case from the beginning.
>
> I am instructed that the first defendant has not been able to come to court on the ground that he is not well. I am instructed that there is a medical certificate in YA's court and that he is not in a position to travel.
>
> For YA's information the first defendant (referring to Dato' Samsudin) is in South Africa. Because all the documents have been tendered earlier – i.e. medical certificates, I do not wish to go through them and Mr. T.S. Lim has drawn YA's attention to that. But because of the condition the first defendant has been in, an application has been made to YA for the hearing to be adjourned to a date where he would be able to travel or to come to Malaysia.
>
> I am instructed that the application for an adjournment had been turned down. Subject to correction, I also understand that YA had directed that parties made their submissions on the evidence which had been recorded and that Mr. Pathma had in fact completed his submission yesterday. And that YA directed the defendants to make their submissions this morning. I come to appear before YA to make another request that the matter to be adjourned notwithstanding the submission already made by Mr. Pathma so that the full facts of the case from both sides may be available to YA for the purpose of coming to a just conclusion in this matter.
>
> I am aware that the defendants called DW1 Mohd Azahari bin Abu Kassim.
>
> In the event YA still considers it the thing to do is to proceed without the first defendant being able to come to give evidence, I have been acquainted with the facts from Mr. T.S. Lim and I take the view that as at this time it will not be possible for us to make any submission for the defendants.
>
> I am asking YA to re-consider the matter.
>
> I too can't give an undertaking that Dato' Samsudin will be here in January 2001.
>
> If YA feels that the adjournment is not grantable then we will leave the matter as it is.
>
> Mr. Pathma has submitted and it is not fair for us to seek an adjournment to enable Dato' Samsudin to come to court in January 2001. I do not propose to submit as the defendants have yet to close its case and YA will proceed from there.

Mr. M. Pathmanathan, in style, responded and this was what he said:

> With respect, I believe the defence request to adjourn the trial to a date after mid January 2001 has been fully argued and ventilated yesterday. This court has ruled on the matter. In the premises we have crossed the bridge, so to speak, and we cannot now go back and re-open the defence case particularly so since the defence has elected not to make the closing submission. In fact, YA, Your Lordship made the ruling first on the 30.11.2000 when YA directed that the case continues on the first of December 2000 and throughout this week.
>
> On 30.11.2000, the court had informed both parties to be ready with all their witnesses. Therefore, it is my submission that procedurally it is inappropriate to make a second submission today.

If YA is not with me on this, may I go further to say that this trial has proceeded in 5 segments. The first set of dates between 25 September 2000 to 29 September 2000. The second set of dates from 9 October 2000 to 13 October 2000. The third segment on 1.11.2000. The fourth segment was on 20.11.2000 to 24.11.2000 and then on 27.11.2000 to 30.11.2000. And now the fifth segment on 1.12.2000 to 8.12.2000.

Dato' Samsudin is the defendant in the S5 action who also holds 99.999% shares in Rahaz and in the words of DW1 – i.e. the defendant in the D4 action.

On none of these days did Dato' Samsudin see it fit or have the courtesy to attend court not even the dates on 21.11.2000, 22.11.2000, and 24.11.2000.

The reason Dato' Samsudin left Malaysia on 25.11.2000. It was not on account of his physical disability or sickness but purportedly because a certain grandmom fell off the wheelchair in South Africa. That is the reason that he left Malaysia.

His appointment with his doctor for a colonoscopy was something which was scheduled after he went back to South Africa on 25.11.2000.

To my mind, I submit it's a frivolous reason for YA to postpone the trial. Particularly so since the defence opened its case on 24.11.2000 and he could have been called on that very day when he was in Malaysia. Instead the defence chose to call Md. Azahari (DW1) whose evidence now we now know, with respect, is worthless.

It is apparent that only the evidence of Dato' Samsudin is relevant for the determination of the preliminary issue and yet the defence chose not to put him in the witness stand.

YA, it has been clear during this trial that Dato' Samsudin does not intend to take the stand because the evidence of DW1 was rejected for being hearsay because the defence could not confirm nor undertake that they would be calling the said Dato'.

Urged YA to bear in mind that Dato' James Foong J. in dismissing the plaintiffs' Order 14 application and in granting an interim injunction against the plaintiffs from selling the pledged securities had directed an early trial and that early trial was postponed on several occasions.

YA will recall that one of the grounds for the plaintiffs' application in enclosure 44 was that the early trial envisaged by James Foong J. was being delayed by the defendants.

In YA's judgment dated 26 October 2000 at page 136, YA referred to the directive of the Honourable Chief Justice dated 10 April 2000 on the need to be strict in granting an adjournment. It would not be out of place for me to say that the recent amendments to the RHC were designed to put the Judge in the driver's seat with regard to the early disposal of cases.

The whole conduct of the defendants have been towards delaying the trial and this is a matter this court is entitled to take into account. *Lee Ah Tee v. Ong Tiow Pheng & Ors* [1984] 1 MLJ 107, a decision of the Federal Court.

It is Dato' Samsudin who chooses not to come to court. He did not come to court in any of the dates as stipulated – the 5 segments. That speaks eloquently. *Tan Pak v. Cham Boon San & Other Actions* [1992] 2 MLJ 271.

Dato' Samsudin's departure from Malaysia on 25.11.2000 was not a circumstance beyond control. He gave the event in South Africa priority over this case. *Shocked and another v. Goldschmidt and Others* [1998] 1 All ER 372.

Dato' Samsudin deliberately departed from the country. The issue of his health was not relevant on 21, 23, and 24 of November 2000 or even on 22.11.2000. YA must look at the evidence and the contemporaneous documents – P26 and P27, and Dato' Samsudin can say no more than that. These documents at best, show:

(1) conduct of Dato' Samsudin;
(2) public interest in there being an end to litigation;
(3) prevailing situation in there being a backlog in this country.

The decision to ask for an adjournment is a matter of discretion. A factual decision. In this case Dato' Samsudin chose not to come to court. Nobody shuts him out. Court's discretion fully exercised and I pray that the application of re-consideration be rejected.

By way of a response, YM Raja Aziz Addruse said:

I think this statement that Dato' Samsudin chose not to come to court or not intended to turn up is very personal. You can't presume. You cannot presume that he can climb a mountain. There is no indication that he will not be able to come up to Malaysia. As for the 24.11.2000, I draw YA's attention to the fax messages from Debbie Buttler on 24.11.2000 in the morning thereof.

Adjournment is a discretion of the court and no one disputes that principle. But like any other discretion it must be exercised judicially. And those cases referred to by Mr. Pathma have been decided on their own facts. The facts in this case will have to be determined by reference to the medical reports applicable in this case.

Much has been said about the circular about the strictness of conducting cases but circular cannot affect the discretion of the court.

In any legal system judges are there because they have been conferred the discretion.

Really the question is would it be proper in the circumstances for the adjournment to be granted.

Mr. M. Pathmanathan then responded and this was what he said:

Fax dated 24.11.2000 at 9.20 a.m. or 9.25 a.m. We submitted on the basis that Dato' Samsudin was called back because of grandmom's position. We do not know who is this grandmom. However, it says 'Gran's mom' – somebody's mother. The question is whether this court should accede to the defence application.

It involves over RM100 million, and at short notice we had postponed our other cases, and yet Dato' Samsudin felt it was necessary to go back to South Africa on account of 'Gran's Mom' misfortune.

YM Raja Aziz Addruse replied. This was what he said:

The fax dated 24.11.2000 at 9.20/9.25 says it is 'Gran's mom', whereas the fax dated 24.11.2000 at 9.59 says it's 'Grandmom'. People make mistakes in typing.

In rebuttal, Mr. M. Pathmanathan submitted that the:

Signatures of Debbie Butler in both faxes are different.

I then adjourned the matter to the next day, namely, 6 December 2000 in order to consider the application to re-consider YM Raja Aziz Addruse's application on behalf of the defendants.

The Session on 6 December 2000

This was what I wrote, in open court, and it can readily be seen in the notes of evidence:

Oral application by YM Raja Aziz Addruse for this court to reconsider its ruling made on 4.12.00 in refusing the defence request to adjourn the trial to a date after mid January 2001 to enable Dato' Samsudin to testify is dismissed for the following reasons and other reasons that may be added at the time of writing this judgment.

(1) YM Raja Aziz Addruse acknowledged that since Mr. Pathmanathan had completed his submission it was not fair for the defendants to seek an adjournment to enable Dato' Samsudin to come to court in January 2001.

(2) YM Raja Aziz Addruse was unable to give an undertaking that Dato' Samsudin will be in court in January 2001.

(3) The directive of the Honourable Chief Justice of Malaysia dated April 10, 2000 on the need to be strict in granting an adjournment.

(4) The recent amendments to the RHC were designed to put the presiding Judge in control of the proceedings with a view to an early disposal of the case.

(5) Dato' Samsudin saw it fit not to be present in court even though he is cited by name as a party in the S5 proceeding. It must be borne in mind that the trial proceeded on seven (7) different segments.

First segment
On September 25, 2000 to September 29, 2000.

Second segment
On October 9, 2000 to October 13, 2000.

Third segment
November 1, 2000.

Fourth segment
November 20, 2000 to November 24, 2000.

Fifth segment
November 27, 2000 to November 30, 2000.

Sixth segment
December 1, 2000.

Seventh segment
December 4, 2000 to December 8, 2000.

Dato' Samsudin on his own accord chose not to come to court.

(6) From the photostated copies of Dato' Samsudin's passport (only certain pages were photostated), it would be apparent that he was in Malaysia on 21.11.00, 23.11.00, and on 24.11.00 yet he did not attend court.

On 25.11.00 at about 1.05 a.m. he left for Johannesburg to see 'Gran's Mom' or 'Grandmom' who was taken ill after falling from the wheelchair. On 21.11.00, 23.11.00, 14.11.00 (and even on 22.11.00 when Dato' Samsudin went to Singapore) there was no inkling that he was not well. Yet, once he arrived in Johannesburg on 25.11.00, he obtained a medical certificate from Dr. M.W. Caldwell on 25.11.00 itself where the doctor found him unfit for travel for 7 weeks as he needed to be investigated for his 'upper abdominal symptoms'. On 28.11.2000, the same doctor by a certificate confirmed that Dato' Samsudin has 'polyps' and 'he needs to undergo a colonoscopy and gastroscopy.' Dr. Stanley A.R. Cooke by a handwritten memo dated 28.11.00 said that he attended to Dato' Samsudin 'for consultation this morning, and is to be investigated (gastroscopy and colonoscopy) on Friday 1st December to elucidate the cause of his symptoms.' Nothing was mentioned by these good doctors that Dato' Samsudin needed surgery or that his ailment was life threatening.

(7) Look at the conduct of Dato' Samsudin – failed to turn up on the various sittings of this court.

(8) Public interest consideration to be weighed in a balance by the need to put an end to litigation.

(9) Prevailing situation in the country – far too many backlog of cases.

(10) Dato' Samsudin must have known that the case is bad for him and so he instructed his lawyers to submit that the defence was not closing its case until the middle of January 2001. At the same time, the defence be it through Mr. T.S. Lim or YM Raja Aziz Addruse refused to give – in fact they are unable to give an undertaking that Dato' Samsudin will be in Kuala Lumpur and testify in this court in the middle of January 2001. Is the court obliged to wait until the defence close its case notwithstanding the uncertainty of whether Dato' Samsudin will ever turn up in court in the middle of January 2001? Must the court grind to a halt purely on the basis of the tactical approach and the lackadaisical attitude adopted by the defence? Certainly not.

(11) Procedurally this court cannot turn back the clock. The ruling of this court on 4.12.00 in refusing the defence request to adjourn the trial to a date after mid January 2001 should be adhered to by all parties. On 4.12.2000 Mr. T.S. Lim elected not to make any submission. Yesterday YM Raja Aziz Addruse also elected not to submit.

The trial must proceed. Once again, the defence is invited to submit in order to assist this court, after all, the defence has put its defence witness in the person of Mohd Azahari bin Abu Kassim (DW1) in the witness box.

The invitation of this court to submit was declined by YM Raja Aziz Addruse and he had this to say:

As I indicated yesterday My Lord, we are quite prepared to leave the matter as they are.

Mr. M. Pathmanathan responded and this was what he said:

I believe the court has given maximum latitude to the defence to present its case. And I do not think that the defence refusal to close its case should have the effect of leaving the case open ad infinitum. I do not think that this court should be made to look unreasonable simply because Dato' Samsudin chooses not to attend court.

As I have submitted on the 4.12.2000, I think the conduct attracts adverse inference under section 114 (g) of the Evidence Act, 1950 and since the defence has tied the court's hand, I believe the court is compelled to make a decision now on the evidence before the court and the submission of the plaintiff. I therefore pray YA that this court determines the preliminary issue in the negative i.e. that there was no binding agreement to extend the term loan facility by 6 months until 9.4.98 as the defendants had failed to fulfil the conditions precedent i.e to pay the sum of RM14,344,512.00 on or before 15.11.97 or at all.

In the premises, consequent thereto, I pray:

(1) That judgment be entered for the plaintiffs in the S5 and D4 actions against Dato' Samsudin and Rahaz Sdn Bhd for the sum of RM102,149, 359.69 as at 31 October 2000.

(2) That interest on the sum of RM70,380,272.95 at 18% per annum from 1.11.2000 to be paid by the defendants until realisation.

(3) That the counterclaims by Dato' Samsudin in the S5 action and by Rahaz in the D4 action be dismissed with costs.

(4) That the plaintiffs be at liberty to set off the proceeds of the sale of the Merbok Hilir Bhd shares pursuant to the order of court dated 22 August 2000 together with interest earned thereon against the judgment sum.

(5) That costs be paid on a full indemnity basis by Dato' Samsudin in the S5 action pursuant to clause 23 of the personal guarantee (exhibit P6) and by Rahaz Sdn Bhd in the D4 action pursuant to section 11.24 (P5) of the facility agreement.

(6) That the order of this court dated 16 December 1998 with reference to the injunction order be set aside and that the senior assistant registrar do assess the damages to be paid by Dato' Samsudin to the plaintiff.

(7) I pray accordingly.

On his part, YM Raja Aziz Addruse replied curtly:

I have nothing to add nor say.

I adjourned the proceedings for thirty (30) minutes and thereafter I mounted the bench and delivered my decision. This was what I wrote in the judge's notebook:

(1) It is my judgment that the preliminary issue as framed be decided in the negative – in that there was no binding agreement to extend the term loan facility by 6 months until 9.4.98 as the defendants had failed to fulfil the conditions precedent by paying the sum of RM14,344,512.00 on or before 15.11.97 or at all.

(2) Judgment should be entered for the plaintiffs in the S5 and D4 actions against Dato' Samsudin and Rahaz Sdn Bhd for the sum of RM102,149,359.69 as at 31 October 2000 based on the statement of accounts as per P67.

(3) That interest on the sum of RM70,380,272.95 at 18% per annum from 1.11.2000 until realisation to be borne by Dato' Samsudin in the S5 action and Rahaz Sdn Bhd in the D4 action.

(4) That the Counterclaims by Dato' Samsudin in the S5 action and by Rahaz in the D4 action be dismissed with costs.

(5) That the plaintiffs be at liberty to set off the proceeds of the sale of the Merbok Hilir Bhd shares to Kilang Bumi Aluminium Sdn Bhd pursuant to the order of this court dated 22 August 2000 together with interest earned thereon against the judgment sum of RM102,149,539.69.

(6) Costs to be paid on a full indemnity basis by Dato' Samsudin in the S5 action pursuant to clause 23 of the personal guarantee as per exhibit P6 and by Rahaz Sdn Bhd in the D4 action pursuant to section 11.24 of the facility agreement as per exhibit P5.

(7) That the order of the court dated 16 December 1998 with reference to the injunction order be set aside and that the senior assistant registrar to assess the damages and such damages to be paid by Dato' Samsudin to the plaintiffs.

I then thanked counsel on all sides for assisting the court and I too stated that the above reasons and other reasons will be added at the time of writing the judgment.

YM Raja Aziz Addruse then proceeded to address the court and this was what he said:

May I make an application at this stage for a stay of execution pending appeal. The amount as YA mentioned are quite large and it would be appropriate that stay be granted pending the appeal.

Mr. M. Pathmanathan responded and he vehemently submitted as follows:

I object to the oral application for a stay.

The law is clear, it is only granted in exceptional circumstances or where the appeal would be rendered nugatory.

Only appropriate that these special or exceptional circumstances be stated in the form of an affidavit and the plaintiffs be allowed to respond.

I pray that the court direct that a formal application be made.

In any event, no special circumstances have been advanced by the defendants.

The fact that the amount is large is not a special circumstance.

I pray that the merits of the stay be heard on a formal application.

The notes of evidence then showed the following recitals:

Court to YM Raja Aziz: You should file a formal application for a stay.

YM Raja Aziz Addruse responded favourably and he said:

I am quite agreeable with that. According to procedure, I need to make an oral application and no problem to file a formal application.

Pending the filing of the formal application for a stay and YA's disposal of it, I would ask for an interim stay.

Mr. M. Pathmanathan objected in strong terms and this was what he said:

I object strongly to any interim stay. Judgment has been given after full trial and it is trite that the successful litigant should not be deprived of the fruit of his litigation. Such an interim order is unfair. The plaintiffs should not be shackled particularly so since the plaintiffs have been out of pocket in granting this loan and even if the 6 months extension that the defendants contended was granted, which was not the case, had long since passed. It would cause the plaintiffs to suffer grave injustice.

YM Raja Aziz Addruse merely said:

I have nothing to add.

I then proceeded to make the following rulings:

(1) Oral application for a stay refused. The defendants to file a formal application for a stay.

(2) Oral application for an interim stay pending filing of the formal application for a stay also refused.

Analysis Of The Available Evidence

The plaintiffs' case was solid as the rock of Gibraltar. It was pointless on the part of the defendants to insist that there was a binding agreement reached between the parties to roll over the loan given by the plaintiffs for a further period of six (6) months expiring on 9 April 1998 when the evidence showed otherwise. That date – referring to 9 April 1998, had come and gone and on the last day of hearing, which was on 6 December 2000, there was no submission by either party that the defendants have finally paid off the loan together with the outstanding interests and costs thereto. The statement of accounts in exh. "P67" showed a colossal sum of RM102,149,359.69 as at 31 October 2000 which the defendants in the Samsudin Action and in the Rahaz Action have to shoulder. The interests on the sum of RM70,380,272.95 at 18% per annum from 1 November 2000 until realisation which must be borne by

Dato' Samsudin in the Samsudin Action and by Rahaz Sdn Bhd in the Rahaz Action were certainly a large sum. Fortunately, the plaintiffs were given the liberty to set off the proceeds of the sale of the Merbok Hilir Bhd shares to Kilang Bumi Aluminium Sdn Bhd pursuant to the order of this court dated 22 August 2000 together with interests earned thereon against the judgment sum of RM102,149,359.69. In regard to costs, Dato' Samsudin must certainly pay and be ordered to pay on a full indemnity basis in the Samsudin Action pursuant to cl. 23 of the personal guarantee as seen in exh. "P6" and likewise Rahaz Sdn Bhd too must pay the costs in the Rahaz Action pursuant to s. 11.24 of the facility agreement as reflected in exh. "P5". The moral of this case was this. That every loan which has been disbursed must be repaid. Nothing comes free in the business world. According to Charles Lamb, in a book entitled *"The Two Races of Men"*:

> The human species, according to the best theory I can form of it, is composed of two distinct races, the men who borrow and the men who lend.

and, in the context of the present case, the categorisation was quite apparent.

The evidence of Lum Sing Fai was amply corroborated by Francis Yong Wing Kheong (PW2) ("Francis Yong") and Loh Kam Chuin (PW5) ("KC Loh") particularly on the point that none of them had the authority to extend the loan. Only the directors of Fulcrum were vested with the authority to grant approvals for extensions and these personalities – referring to Lum Sing Fai, Francis Yong and KC Loh, were not in that league at all.

In regard to the preliminary issue as framed by this court, the salient parts of Francis Yong's evidence in examination-in-chief as distilled from the notes of evidence would be reproduced hereinunder:

(1) That he was not authorized to extend loan or make material variations of loan already approved. And that this was a strict and fast rule. During his tenure of office in Fulcrum he did not at any time approve a loan or extend a loan.

(2) That he remembered that on 14 November 1997, he met Dato' Samsudin in the latter's office at Wisma Socfin, Kuala Lumpur. In that meeting, no one else was present except the two of them. In that meeting, he did not agree to extend a loan which Rahaz Sdn Bhd had taken from Fulcrum. The purpose of that meeting was to meet up with Dato' Samsudin to discuss what plans the said Dato' had to settle the loan to Fulcrum which was already due. The focal point of attention in that meeting was in regard to the facility agreement as seen in exh. "P5" at p. 21 of bundle "A" which became overdue on 10 October 1997.

(3) That he was aware of the letter from Rahaz Sdn Bhd as seen in exh. "P20" of p. 123 of bundle "A", and that by way of a response Fulcrum had sent a letter signed by him as seen in exh. "P21" of p. 124 of bundle "A". He too was aware that the facility agreement was due to expire on 9 October 1997 when he wrote the letter in exh. "P21". That at all times, he never represented to Dato' Samsudin nor to Rahaz Sdn Bhd that he had the authority to approve or vary the terms of the loan. According to him, most of the times Dato'

Samsudin was representing Rahaz Sdn Bhd. He too did not hold himself out as having the authority to extend the loan facility. That the gist of the meeting with Dato' Samsudin on 14 November 1997 was this: that Dato' Samsudin offered to pay a sum of RM6.5 million and requested that the balance amount be rolled over. According to Francis Yong, he did not agree to Dato' Samsudin's proposal and told the said Dato' that this needed the approval of the management and that he – meaning Francis Yong, would bring back Dato' Samsudin's proposal for the consideration of the management. In that meeting too, Francis Yong did not agree at any time to withhold legal action.

(4) In that meeting – referring to 14 November 1997, Dato' Samsudin asked that legal proceedings be withheld in exchange for RM6.5 million and the said Dato' actually offered to give Francis Yong a cheque for RM6.5 million to take back to the office but Francis Yong refused to accept the cheque and told the said Dato' that the matter needed the approval of the management.

(5) When he left Dato' Samsudin's office on 14 November 1997, no understanding was reached between them.

(6) That Rahaz Sdn Bhd did not pay RM14,344,512 or any sum at all on or before 9 October 1997.

(7) That by letter dated 21 October 1997 as seen in exh. "P24" of p. 128 of bundle "A", Rahaz Sdn Bhd paid a sum of RM1.5 million and also offered to pay the balance of interest by the end of October 1997.

(8) That the contents of the letter dated 18 November 1997 from Rahaz Sdn Bhd in exh. "P26" of p. 130 of bundle "A" which alleged that there was an agreement to extend the loan for six months and which also alleged that there was an agreement to withhold legal action in consideration of the payment of RM6.5 million were not true and were not correct. In response thereto, he prepared a letter dated 18 November 1997 as seen in exh. "P27" of p. 131 of bundle "A" which was signed by KC Loh, and in that letter Fulcrum denied the agreement to extend the loan for six months and Fulcrum also denied the agreement to withhold legal action in consideration of the RM6.5 million. Interestingly enough, the letter in exh. "P27" was co-signed by Francis Yong. Of interest too would be the fact that Rahaz Sdn Bhd did not reply to exh. "P27". Dato' Samsudin too did not revert back to Fulcrum or to Francis Yong in regard to exh. "P27". Rahaz Sdn Bhd and its employees did not revert to Francis Yong or to Fulcrum in regard to exh. "P27". Neither did Dato' Samsudin nor Rahaz Sdn Bhd took any action to stop payment or demand the return of the two cheques amounting to RM6.5 million.

(9) In regard to the letter dated 4 December 1997 from Fulcrum as seen in exh. "P28" of p. 132 of bundle "A", neither Rahaz Sdn Bhd nor Dato' Samsudin reverted back to Fulcrum within the seven days dateline.

Under cross-examination, this was what Francis Yong said in the context of the preliminary issue as framed:

(1) That in the course of his employment with Fulcrum he had never acted beyond the scope of his authority.

(2) That he had attended the meeting with Dato' Samsudin on 14 November 1997 and it was done on behalf of Fulcrum. That the purpose of the meeting was to discuss matters relating to a term loan facility granted by Fulcrum to Rahaz Sdn Bhd.

(3) That the head of department at Fulcrum had no authority to approve, vary, modify or extend loans. That he was authorised to sign exh. "P21" as seen at p. 124 of bundle "A".

(4) It was put and he disagreed that when he attended the meeting with Dato' Samsudin on 14 November 1997 on behalf of Fulcrum, it did not come within the list of "Can Do" items as per p. 141 of bundle "A".

(5) He agreed that he was Fulcrum's representative who most frequently dealt with Rahaz Sdn Bhd and Dato' Samsudin. That by letter dated 10 October 1997 as per exh. "P22", Fulcrum had agreed to grant the extension of six months as requested by Rahaz Sdn Bhd subject to the fulfilment of the following conditions:

(a) payment of the outstanding interest amounting to RM13,719,512; and
(b) payment of an extension fee of RM625,000.

which have to be paid within seven days thereto – meaning on 17 October 1997. The total amount came up to RM14,344,512 (RM13,719,512 plus RM625,000). But the payment of RM14,344,512 was never made.

(6) That Fulcrum had the option to recall the facility in its entirety because at that point of time the loan was overdue; but to maintain cordial relationship Fulcrum was open to suggestions to repay from Rahaz Sdn Bhd and from Dato' Samsudin. That Fulcrum was prepared to extend the facility subject to partial repayment in the sum of RM14,344,512. That in exhs. "P23" and "P28" Rahaz Sdn Bhd had requested for more time to pay the sum of RM14,344,512.

(7) A new document was shown to Francis Yong which was dated 4 November 1997 and that document was signed by Francis Yong and it was accordingly marked as exh. "D38" which was worded in this way:

Fulcrum Capital Sdn. Bhd. (193390-V)
Lot 271, Jln Dua
Off Jalan Chan Sow Lin
55200 Kuala Lumpur
Malaysia

FACSIMILE
TRANSMISSION

Tel: 03-2210811 Fax: 03-2217793

To: Dato' Samsudin Abu Hassan

Company: Rahaz Sdn. Bhd.
c/o SMG Corporation

Facsimile No: 00-2711-8847460

Number of pages including cover sheet: 1

From: Francis W.K. Yong

Date: November 4, 1997

YB Dato',

Re: Interest Outstanding of RM12,844,512 Due From Rahaz Sdn. Bhd. ('Rahaz')

Further to your request to defer the payment of the abovementioned interest due under Rahaz's loan facility with us until end October 1997 of which we have consented to earlier, we are disappointed to note that till todate we have not receive(d) payment.

As spoken over the phone with your goodself on October 31, 1997 and after due consideration, we will give you a FINAL DEADLINE by November 15, 1997 to settle in full the interest outstanding of RM12,844,512. Please note that if we do not receive payment by then, we will be left with no alternative but to proceed immediately with legal action to recall the loan facility granted to Rahaz.

Thank you.

Regards,

Sgd. (Illegible)
Francis W.K. Yong.

and by this letter, Fulcrum had agreed to extend the dateline of 31 October 1997 to 15 November 1997.

(8) That he agreed that the telephone conversation on 9 October 1997 as alluded to in exh. "P23" was in regard to a telephone conversation between Dato' Samsudin and himself. During that telephone conversation, Dato' Samsudin had requested to defer the payment of interest due to the end of October 1997. In that telephone conversation, he did not inform Dato' Samsudin that Fulcrum had agreed to defer the payment of interest due to the end of October 1997 because it was beyond his authority to do so, but he did, however, inform Dato' Samsudin to write in officially with his request in order to facilitate its presentation to Fulcrum's management.

(9) That during his tenure in Fulcrum, what was clear was that decisions to approve, vary, modify or extend loans were in the hands of the management which was essentially that of Tan Sri Dato' Azman Hashim. At that time too, Jimmy Lim and Soo Kim Wai were in the management. He agreed that if any of these personalities were to make a decision in regard to the term loan facility, he would have conveyed their decision to Rahaz Sdn Bhd or even to Dato' Samsudin.

(10) It was put and he strongly disagreed that in the telephone conversation on 9 October 1997 between Dato' Samsudin and himself that he had agreed on behalf of Fulcrum to the request to defer payment of the interest to the end of October 1997.

(11) He agreed that the status of the listing application for Merbok Hilir Bhd was an important issue for Fulcrum. He also agreed that the listing of Merbok Hilir Bhd was important because of the Securities held by Fulcrum. He too agreed that the listing status of Merbok Hilir Bhd was also important because it was envisaged that it would be a source of repayment of the term loan facility. He disagreed that it was on this basis that Fulcrum had agreed to

extend time for the payment of the interest. He said that what was more correct was that the conditions prior to extensions were never met and Fulcrum essentially withheld action and granted indulgence, firstly, to Dato' Samsudin's request for an extension to the end of October 1997 and, secondly, to a further dateline of 15 November 1997 and these dates were all breached by Rahaz Sdn Bhd.

(12) That Merbok Hilir Berhad's application to the Securities Commission for listing on the Kuala Lumpur Stock Exchange was rejected and this can be seen in a letter dated 15 October 1997 addressed to Arab-Malaysian Bank Berhad from the Securities Commission. This letter was produced by Francis Yong under cross-examination and it was marked as exh. "D39(A)" comprising the Malay language version and its translation marked as exh. "D39(B)". The translation was in the English language and it was worded in this way:

TRANSLATION

LETTER FROM	:	Securities Commission
ADDRESSED TO	:	Arab-Malaysian Bank Berhad
ATTENTION TO	:	Managing Director
DATED	:	15 October 1997
SIGNATORY	:	Dato' Dr. Mohd. Munir Abdul Majid
REFERENCE TO	:	SC/SID/1391
CC TO	:	Ministry of International Trade and Industry, Foreign Investment Committee, Registrar of Companies and Kuala Lumpur Stock Exchange

LIMITATIONS

Although Arab Malaysian Merchant Bank Berhad ("Arab-Malaysia") has made efforts to ascertain the accuracy and reliability of the translation provided herein, we do not make any representation or warranty, expressed or implied, or assume any responsibilities as to their accuracy or completeness. We reserve the right to review this translation and if necessary, revise it in light of any information which becomes known to us after the translation date.

REF: MERBOK HILIR BERHAD ('MERBOK') PROPOSED FLOATATION ON THE MAIN BOARD OF THE KUALA LUMPUR STOCK EXCHANGE ('KLSE')

We refer to your application on behalf of Merbok seeking for the proposed flotation on the Main Board of the KLSE.

2. We inform that the application is not approved based on the following factors:

(i) The suitability of Dato' Samsudin Abu Hassan's ('Dato' Samsudin') stewardship of a public company listed on the KLSE in view of his past conduct as the Deputy Executive Chairman and the main shareholder of Aokam Perdana Berhad ('Aokam'), his involvement in the management of Aokam and in particular the failure of the company in meeting its forecast profit for the financial year ended 30 June 1995;

(ii) Dato' Samsudin past involvement in Mitrajaya Holdings Berhad ('Mitrajaya') and the eventual divestment of his entire equity interest in Mitrajaya is inconsistent with the rationale on which the shares were

offered to him initially, which is to encourage the participation of Bumiputera investors in the company. In addition, Dato' Samsudin's representation in his application for lifting of the moratorium on the disposal of his shares which is to concentrate in his business ventures abroad is inconsistent with the expressed commitment and involvement in Merbok; and

(iii) Dato' Samsudin's involvement in Merbok, in line with his position as the Chairman and largest equity holder is not reflected in his participation in the meetings of the board of directors of Merbok MDF Sdn Bhd, which is lacking, especially in 1996 where he failed to attend any of the meetings held during that year.

Yours sincerely,
END.

It must be borne in mind that the Merbok Hilir Bhd shares have been sold to Kilang Bumi Aluminium Sdn Bhd by order of this court dated 22 August 2000.

(13) A new document, a fax from Fulcrum, was shown and it was marked as exh. "D40" and it was dated 16 December 1997 and he said that as of the date of the fax, he believed that Fulcrum got wind of the information that Merbok Hilir Bhd had put in an appeal against the earlier decision of the Securities Commission; and whether Fulcrum was hopeful of the prospect of listing was beyond their control.

(14) It was suggested and he strongly disagreed that at the meeting of 14 November 1997, he had conveyed to Dato' Samsudin of Fulcrum's decision to agree to Dato' Samsudin's proposal in respect of the payment of RM6.5 million and that upon such payment the balance interest and the term loan facility would be rolled over until 9 April 1998 and that no legal action would be taken against Rahaz Sdn Bhd. A strong disagreement was registered in regard to these suggestions because he said that it was very clear that he did not have the mandate nor the authority to agree to such proposals to roll over the balance interest and withhold legal action. He said that he employed the following words when he spoke to Dato' Samsudin:

I will bring back this proposal to Fulcrum's management and revert to him in due course.

He strongly maintained that no agreement whatsoever was reached between Dato' Samsudin and himself with regard to the roll over interest and to withhold legal action.

(15) That in October and November 1997, Fulcrum did not have a managing director. What Fulcrum had was a head of department and two or three directors. And the directors of Fulcrum were Jimmy Lim, Soo Kim Wai and Richard Azlan Abas. He did not know whether Richard Azlan Abas was an alternate director. He was not aware that one of these directors had a scheduled meeting with Dato' Samsudin for the week beginning 17 November 1997. He cannot remember whether he had called Dato' Samsudin after the meeting of 14 November 1997 or on 15 November 1997. He was not able to remember whether he had called Dato' Samsudin on 14 November 1997 or 15 November 1997 to bring forward a scheduled meeting between Dato'

Samsudin and a director of Fulcrum to the afternoon of 17 November 1997. It was put and he disagreed that there was a meeting between Dato' Samsudin and a director of Fulcrum between 14 November 1997 and 18 November 1997 because he said that if it did really happen he was not made aware of such a meeting. It was put and he disagreed that at the meeting on 17 November 1997, Fulcrum had reiterated and confirmed Fulcrum's agreement to Rahaz Sdn Bhd's proposal to pay RM6.5 million and the balance interest and term loan facility to be rolled over until 9 April 1998 and that no legal action would be taken against Rahaz Sdn Bhd; and he maintained that he was not aware of such a meeting if it ever took place. At any rate, he too stated that no such agreement was ever reached during the meeting on 14 November 1997.

(16) That in relation to exh. "P26" as seen at p. 130 of bundle "A", the sum of RM6.5 million was tendered at the initiative of Rahaz Sdn Bhd or even that of Dato' Samsudin. The fact remained that there was no agreement whatsoever that was reached pertaining to the two issues of roll over and not taking legal action.

(17) The serious assertions in exh. "P26" was replied by exh. "P27" and he categorically stated that the meeting on 14 November 1997 was between Dato' Samsudin and himself only and that no other parties were involved. He said that it was obvious that the assertions were directed towards him. He said that he was enraged and totally dismayed when he first saw exh. "P26". That his first draft of exh. "P27" was strongly worded to deny the assertions in exh. "P26". But since he was not allowed to sign the letter by himself, he was advised to tone down the language in order to maintain cordial client bank relationship. However, exh. "P27" as it presently stood refuted the assertions in exh. "P26" in a polite manner.

(18) The truth of the matter was this. That the term loan facility was in default at the end of business day on 9 October 1997 and Fulcrum was just reserving its right to demand full repayment of the term loan facility.

(19) That Fulcrum issued a letter dated 9 December 1997 to Rahaz Sdn Bhd enquiring about the status of the listing of Merbok Hilir Bhd. That letter was duly marked as exh. "D41" and it was worded as follows:

Fulcrum Capital Sdn. Bhd.
(Company No. 193390-V)
Licensed Moneylender)
A subsidiary of Arab-Malaysian Corporation Bhd.

PRIVATE & CONFIDENTIAL
Our Ref: 97/fy/627
December 9, 1997

Rahaz Sdn. Bhd.
3rd Floor, Wisma Socfin
Jalan Semantan
Damansara Heights
50490 Kuala Lumpur

By Fax & Hand
Fax No. 03-2551082

Attn: YBhg. Dato' Samsudin Abu Hassan/Encik Mohd. Azahari Abu Kassim

YBhg. Dato'/Dear Sir,

RE: LISTING STATUS OF MERBOK HILIR BERHAD ('Merbok')

We refer to the abovementioned.

In light of the recent announcement by the Finanace Minister on the blanket freeze on new listings, rights issues and corporate restructuring, we are duly concern(ed) on the effect on Merbok's appeal for listing on the KLSE.

Hence, we would appreciate your reply on whether Merbok's chances for listing will be affected by the new developments in Malaysian capital market as announced by the Finance Minister. If so, kindly provide us with documentary evidence in support for Merbok's listing.

Please acknowledge receipt by signing and returning to us the duplicate copy of this letter.

Thank you.

Yours faithfully
FULCRUM CAPITAL SDN. BHD.

Sgd. (Illegible)	Sgd. (Illegible)
LUM SING FAI	FRANCIS YONG WING KHEONG
General Manager	Manager

cc Arab-Malaysian Merchant Bank Berhad
Attn: Mr. Murugiah (Fax No: 03-2308596).

(20) To a question whether the reason for the issuance of exh. "P28" as per p. 132 of bundle "A" was because of the bad market crisis faced by Malaysia and the blanket freeze on new listing, he replied that exh. "P28" was written in reply to exh. "P26" as per p. 130 of bundle "A" and as a follow up to exh. "P27" as per p. 131 of bundle "A". That being the case he said that he did not see any linkage to the market conditions with regard to Merbok Hilir Bhd listing status. At any rate, it would be pertinent to note that in point of time, the letter in exh. "D41" was written on 9 December 1997 whereas exh. "P28" was dated 4 December 1997 and exh. "P27" was dated 18 November 1997, while exh. "P26" was also dated 18 November 1997.

(21) That his role as Fulcrum's authorised representative was confined to maintaining and developing contact with Rahaz Sdn Bhd and Dato' Samsudin but not as a representative to approve, extend, vary, modify or agree to any changes under the term loan facility.

The re-examination of Francis Yong was also focussed on the preliminary issue as framed and this was what he testified:

(1) That his job title can be seen at p. 138 of bundle "A" and the scope of his authority can be found at p. 141 of bundle "A". He re-confirmed that he was given pp. 138 and 141 of bundle "A". He stated that he did not at any time had sight or access to the job title descriptions and responsibilities that appeared at pp. 133 to 137 and at pp. 139 to 140 of bundle "A" and that he only had sight of them, for the very first time, during the trial.

(2) That he had spoken to Dato' Samsudin on several occasions over the phone and written several faxes to Dato' Samsudin which were signed singularly by him and he too met Dato' Samsudin on one occasion on 14 November 1997 and all these things were authorised by Fulcrum for him to do and that

authority was in accordance with point number 7 of p. 138 of bundle "A", namely, "to market, maintain and develop contact with potential and existing clients for business expansion."

(3) In regard to exh. "P21" as seen at p. 124 of bundle "A", he said he was authorised to send a fax of this nature to clients generally and to Rahaz Sdn Bhd in particular. He highlighted the distinction between a fax and a letter and he compared it with exh. "P22" as seen at p. 125 of bundle "A" which was a letter and he said that the distinction can be seen from the letterhead of exh. "P22" and the letterhead of exh. "P21". In exh. "P21", the words, "Facsimile Transmission" appeared at the top right hand corner whereas in exh. "P22" those words were absent. He emphasised that his actions have been consistent throughout.

(4) He confirmed that he did not sign exhs. "P27", "P28" and "D41" by himself as the sole signatory but rather it was co-signed by the senior manager or the general manager. In all these letters, his designation was stated as the manager and these letters too were in facsimile formats.

(5) That exhs. "P21", "D38" and "D40" were signed by him alone without stating his designation but merely stating his name. He emphasised that fax transmissions were used in an informal way in order to maintain contact whereas letters were more official in nature.

(6) That he had never been reprimanded or disciplined for exceeding his authority in having sent those faxes to Rahaz Sdn Bhd or to any other clients during his employment with Fulcrum. That he was not prohibited from speaking to clients or customers of Fulcrum or meeting them in the discharge of his duties because this was expressly provided for under point number 7 of p. 138 of bundle "A".

(7) In his fax to Dato' Samsudin of Rahaz Sdn Bhd as seen in exh. "P21", he was mindful of the expiry of the tenure of the loan as reflected in the passage which was worded in this way:

> Meanwhile, please be informed that as conditions prior to rollover, the total sum of RM14,344,512 shall be paid to us on or before 9 October 1997.

In exh. "P21", Rahaz Sdn Bhd was told that the extension of the term loan was pending approval which approval "will strongly depend" on Rahaz Sdn Bhd paying RM14,344,512 on or before 9 October 1997.

(8) He confirmed that he had a telephone conversation with Dato' Samsudin on 9 October 1997 pertaining to the dateline as alluded to in exh. "P21". The purpose of that telephone conversation was simply as a follow up to exh. "P21".

(9) He was referred to exh. "P23" as seen at p. 127 of bundle "A", particularly to the second paragraph thereto which was worded in this way:

> Further to our telephone conversation on the 9 October 1997, I wish to write on behalf of Rahaz that its request to defer the payment of the interest due to the end of October 1997.

and he was asked whether it was correct and he answered in the positive. And that in the discharge of his duties he had again called Dato' Samsudin on 31 October 1997 in regard to the status of the "request" and the promise of repayment. In his facsimile transmission to Dato' Samsudin as per exh. "D38", there was reference at the second paragraph in regard to his telephone conversation with Dato' Samsudin on 31 October 1997 and according to him this was a follow up of the telephone conversation on 9 October 1997 as alluded to in exh. "P23". And in the penultimate paragraph of exh. "P23", Dato' Samsudin said:

> I will inform you of further developments. In the meantime, I shall be back in Malaysia on 20th October for a few days and shall be pleased to meet you.

and arising out of it, he was asked whether Dato' Samsudin kept his word and met him around 20th October 1997 and he replied:

> No, he did not.

He continued that as far as he could tell Dato' Samsudin was not in Malaysia on or about 20 October 1997. He was able to confirm that the only payment he received from Rahaz Sdn Bhd by the end of October 1997 was a sum of RM1.5 million which was sent by letter dated 21 October 1997 as seen at exh. "P24" of p. 128 of bundle "A". In regard to exh. "D38", which alluded to the final dateline by 15 November 1997 he said that neither Dato' Samsudin nor Rahaz Sdn Bhd kept to the dateline. He further said that in anticipation of the dateline not been met based on past broken promises of Dato' Samsudin, he then initiated a meeting one day before the dateline and that was on 14 November 1997 in order to hear Dato' Samsudin's proposal, if any. He said that in seeing Dato' Samsudin on 14 November 1997 he was acting within the scope of his authority as specified in point 7 of p. 138 of bundle "A" in order to maintain contact with an existing client.

(10) That there was an anomaly in his appointment where his job was described as an assistant manager whereas the letter of appointment specified as a manager. That it was also true to say that in the letters that he had co-signed, he was described as a manager. That he believed that it was generally understood that the cardinal rule in Fulcrum was that even up to the head of department, at that time, carrying the designation of general manager did not have the power to approve, vary, modify and extend loans. And that at that point of time, the head of department of Fulcrum was Lum Sing Fai – who was identified by Francis Yong in open court.

(11) That the purpose of seeing Dato' Samsudin on 14 November 1997 was to follow up on the proposals for repayment of the term loan facility that was already in default by the end of business day on 9 November 1997 and in particular in reference to the fax dated 4 November 1997 as seen in exh. "D38".

(12) That in Fulcrum, the authority and power to vary, modify or extend loans lie with the management committee comprising of Jimmy Lim, Soo Kim Wai and Tan Sri Dato' Azman Hashim. This Committee was aware that he was going to see Dato' Samsudin on 14 November 1997 and that no mandate or authority was given to him to agree on any matter relating to the loan facility. The

instructions that were given to him were very clear. And it was this: to hear Dato' Samsudin out in regard to any proposals to repay and to bring back for management considerations. He was mindful of these instructions from the management when he attended the meeting on 14 November 1997 with Dato' Samsudin. He reconfirmed that there was nobody else at that meeting – referring to the meeting on 14 November 1997, except himself and Dato' Samsudin.

(13) That when he went to see Dato' Samsudin on 14 November 1997, he did not discuss any matter in regard to the term loan facility with anybody in Rahaz Sdn Bhd including Azahari because most of his contact with regard to the matters pertaining to the term loan facility was with Dato' Samsudin. He said that the meeting, that was brought up during cross-examination, with Azahari never took place. He said that he just exchanged greetings with Azahari and probably had a casual chat while waiting for Dato' Samsudin who was held up with somebody else when he arrived at Dato' Samsudin's office. He confirmed that he did not discuss the issue of the loan facility with Azahari in the course of his casual chat with him. That during the meeting on 14 November 1997, Dato' Samsudin offered to pay RM6.5 million and requested for the balance interest to be rolled over and further requested Fulcrum to withhold legal action to demand repayment of the entire facility which Dato' Samsudin was fully aware that it was in default since the end of business day on 9 October 1997. Recognising his authority, he clearly mentioned to Dato' Samsudin that he could only convey his proposal to the management and revert accordingly. He re-confirmed that at that meeting, Dato' Samsudin offered him a cheque for RM6.5 million in favour of Fulcrum, but he did not accept the cheque because he had to take direction from his management whether to accept such a large amount. He said that assuming that he had the authority granted by the management he would have no qualms to accept the cheque because the term loan facility was already in default.

(14) He was referred to exh. "P26" of p. 130 of bundle "A" and he was asked whether he agreed or denied the contents of exh. "P26" which stated that at the meeting between Dato' Samsudin and himself on 14 November 1997 that he had agreed on behalf of Fulcrum that on payment of RM6.5 million, the loan would be extended for six months until 9 April 1998 and that no legal action would be taken against Rahaz. His response went like this:

> I strongly deny the contents of this letter (P26) in particular to paragraphs 3 and 4 which is a total untruth and a fraudulent statement.

(15) That when he first had sight of exh. "P26" on 18 November 1997 he was enraged and dismayed. He said that he never agreed to paras. 3 and 4 of exh. "P26" and to him these were serious assertions. He said that he was very dismayed with the fact that an international businessman of international reputation would stoop to such level to twist the fact. Nevertheless, he said that the reply which he co-signed with KC Loh in exh. "P27" was a toned down version of his response in order to maintain cordial customer banker relationship. He said that in exh. "P27", he had denied the contents of paras. 3 and 4 of exh. "P26". He confirmed that neither Rahaz Sdn Bhd nor Dato' Samsudin, at any time thereafter, challenge or dispute the contents of exh.

"P27". He too confirmed that neither Rahaz Sdn Bhd or Dato' Samsudin took any action to stop payment of the cheques totalling RM6.5 million or demand the return of those cheques.

(16) That he did not know of any meeting between one of the directors of Fulcrum and Dato' Samsudin that took place after he had met the said Dato' on 17 November 1997. He said that there was no request from Rahaz Sdn Bhd or Dato' Samsudin for him to arrange for such a meeting. He was asked categorically the following question:

> If a meeting did take place on 17.11.97 between Dato' Samsudin and a director of Fulcrum where it was agreed that the loan facility would be extended and no legal action would be taken, do you agree with me that such a meeting would carry greater weight than Dato' Samsudin's meeting with you on 14.11.97?

and he answered in this way:

> Yes, I agree and I give Dato' Samsudin enough credibility in not being so naïve as to prefer my alleged arrangement with him rather than the so called director whom he met with. And just looking back on P26, which was dated 18.11.97, if he had had a meeting with the director of Fulcrum on 17.11.97 he would have mentioned it in P26 rather than only mentioning myself.

During the continued session on 13 October 2000, Mr. M. Pathmanathan addressed the court and he enquired of Mr. TS Lim the identity of that mysterious director of Fulcrum who purportedly attended the meeting on 17 November 1997 with Dato' Samsudin. Mr. TS Lim volunteered the name of that mysterious director of Fulcrum as Dato' Jimmy Lim Thaw Chay (PW4) (hereinafter referred to as "Dato' Jimmy Lim"). The re-examination of Francis Yong then continued and this was what he said. That he did not have any knowledge of making a call to Dato' Samsudin between 14 November 1997 and 15 November 1997 in order to bring forward a scheduled meeting between Dato' Samsudin and a director of Fulcrum to 17 November 1997. He said that it was not possible for him to have made that conversation without the specific approval of the management of Fulcrum. He said that the first time he heard about the alleged meeting between Dato' Samsudin and a director of Fulcrum on 17 November 1997 was during the cross-examination that was brought up by the defendant's counsel.

(17) By exh. "P21", Fulcrum was prepared to consider extending the loan for six months but restricting to the loan facility of only RM62.5 million. He said that at para. 3 of exh. "P21", the sum of RM14,344,512 was requested as payment prior to the extension of the loan. And that the sum of RM14,344,512 was made up of two components as mentioned in (i) and (ii) of exh. "P21". He said that the sum of RM62.5 million was the amount deducted from RM13,719,512. The actual sum owing or due as at 9 October 1997 was RM76,219,512. He said that the sum of RM13,719,512 represented the request of partial repayment of the total sum due. As such, the amount to be extended would be RM62.5 million. The amount of the total sum that was due was RM76,219,512 minus RM13,719,512 equalled the sum of RM62.5 million. He said that at the close of business on 9 October 1997, the sum due was RM76,219,512. In exh. "P21" at p. 123 of bundle "A", Rahaz Sdn Bhd requested for the entire amount of RM76,219,512 to be rolled over.

In exh. "P21", Fulcrum was considering to extend the sum of RM62.5 million. He said that he could explain it clearly. He then referred to (ii) of exh. "P21" where there was reference to a roll over fee of 1% flat on the amount to be extended and that 1% of RM62.5 million would come up to RM625,000. That in (i) of exh. "P21", the sum of RM13,719,512 that Fulcrum asked Rahaz Sdn Bhd to pay represented the interest portion of the entire loan that was funded by Fulcrum. That the sum of RM625,000 represented the fee that Fulcrum charged Rahaz Sdn Bhd and it did not represent the interest.

To a question whether the sum of RM13,719,512 under (i) of exh. "P21" which is referred to as an "interest outstanding up to 9 October 1997" – was that precise, he replied:

> Nope. It is loosely defined as interest outstanding but in actual fact it was a portion of the entire sum of RM76,219,512.00 that was owed.

He said that Rahaz Sdn Bhd and Dato' Samsudin knew at all times that the sum of RM13,719,512. was a portion of the term loan of RM76,219,512 and not an outstanding interest up to 1 October 1997 because the monthly statements which have been sent to them every month reflected this especially the monthly statements from November 1996 onwards. He said that it was preposterous to think that Dato' Samsudin who is a chartered accountant by profession and his fellow business professionals that assisted him in Rahaz Sdn Bhd failed to understand the monthly statements. He said that Rahaz Sdn Bhd and Dato' Samsudin, at all times, were fully aware that the interest for the loan facility was paid upfront. He said that under s. 6.01 of the facility agreement in exh. "P5" of p. 20 of bundle "A", Rahaz Sdn Bhd had agreed with Fulcrum that the interest of the facility shall be paid upfront upon the disbursement of the facility and that Rahaz Sdn Bhd had expressly authorised Fulcrum to deduct the said interest from the facility upfront. He said that exh. "P19(A)" as seen at p. 108 of bundle "A" was the monthly statement from 31 October 1996 to 30 September 1997 informing Rahaz Sdn Bhd for the attention of Dato' Samsudin that the interest deducted upfront was RM13,719,512. In regard to exh. "P22" at p. 125 of bundle "A", he confirmed that at para. 2 thereof Fulcrum informed Rahaz Sdn Bhd that subject to the latter's fulfilment of the payment of RM13,719,512 together with the sum of RM625,000 payable within seven days, Fulcrum will then consider extending the loan. That exh. "P22" expressly stipulated the mode and manner of acceptance which was that Rahaz Sdn Bhd was to sign the acceptance on the last section of the letter as per exh. "P22" on a duplicate copy and return the same together with the repayment of RM14,344,512 within seven days but unfortunately Rahaz Sdn Bhd did not execute the duplicate of exh. "P22" nor transmit the sum of RM14,344,512 within seven days thereof. In regard to exh. "P27" of p. 131 of bundle "A", he said that the reference number alluded to therein was "97/fy/609" and that the abbreviation "fy" was the initial of his name "Francis Yong" and he ventured to say that he was the author of exh. "P27". He said that at para. 2 of exh. "P27", the words "accepted by yourselves" were in fact referring to exh. "P22" of p. 125 of bundle "A" in particular the rubber stamp acknowledging receipt that appeared in exh. "P22". That the final deadline on 15 November 1997 as alluded to in exh. "D38" was not complied by Rahaz Sdn Bhd. That under s. 10.01 of the facility agreement the sum became due at the end of business day

and that would be on 9 October 1997. It was s. 7.02 of the facility agreement that provides that Rahaz Sdn Bhd to repay the loan by 9 October 1997. That there was no obligation under the term of the facility agreement on Fulcrum to recall the facility after the expiry of the term loan. That it would be s. 7.01 of the loan facility agreement which provides for "recall" during the existence of the facility. That the events of default under s. 10.01 of the facility agreement particularly para. (b) to para. (n) thereto would give the right of the lender to recall the facility. If there was to be a recall it should have taken place prior to the end of business day on 9 October 1997. That in layman's term the word "recall" would be used interchangeably to mean "proceeding with legal action to demand payment for facility" and what he meant was that there was no legal demand. That the Securities Commission rejected Merbok Hilir Berhad's application for listing on the Kuala Lumpur Stock Exchange. That he was given a copy of exh. "D39(B)" by Dato' Samsudin after he had requested for it during the meeting on 14 November 1997 and that copy was accordingly marked as an exh. "P42". That he had no kind remarks to say of exh. "P42". That Dato' Samsudin wrote to Tan Sri Azman Hashim by fax dated 24 November 1997 as seen in exh. "P43" and that letter was worded as follows:

24 November 1997

YBhg Tan Sri Dato' Azman Hashim

Executive Chairman

AMMB Group	STRICTLY PRIVATE AND CONFIDENTIAL	
Kuala Lumpur	FAX NO	: 09 603 230 7662
MALAYSIA	NO OF PAGES	: 2 INCLUSIVE

Yang Berbahagia Tan Sri,

Greetings from South Africa. Dengan penuh salam hormat.

I hope Tan Sri is getting on fine.

I have closely followed the market developments in Malaysia over the past few months and have been attracted by the many opportunities that have been created. I believe there are plenty around.

I am also astonished by the entire market's behaviour towards the AMMB Group which I feel has been extensively over-played what with the solid performance and spectacular growth over the years. I believe Tan Sri's Group should ride the storm and grow stronger. Tan Sri's great leadership has been the pillar of strength for the group and is highly commendable. What the Malaysian market really needs now is the restoration of confidence. The Government has no doubt put up some good efforts but to some extent, only on an ad-hoc basis. Other markets within the region have simultaneously had contagious effects and have made our market more sensitive prone. I think we will have a period of consolidation with some form of reform and macro adjustments to the economic policies. Along the way we will see some casualties, especially those who are new in the corporate world and those who do not have the experience and the resources to cope and to turn around the misfortunes.

Putting all the factors into perspective, Malaysia as a whole should come out much better than its neighbours. The picture may not be that rosy at the moment but with the strong foundations which have been laid down over the years in strengthening unity and governance, the fundamentals can only make the country stronger. We all

have made mistakes in the past but as long as we keep our heads down and be objective in solving problems we can only improve and move forward. There are still huge resources left and though hopes are high we must continue praying for the better.

On a positive note, I am one of those who have been fortunate to relinquish my various positions in the Malaysian market three years ago. I am now fully settled and perhaps would like to take a look at some of the opportunities available in the near future. My investments and business undertakings in this country have since prospered due mainly to total discipline, prudence and a high work-rate. With this in mind, may I inform Tan Sri that I would like to offer my services, indirectly or directly, to the AMMB/Amcorp Group lending my experience where there are opportunities. I am more than willing and able as I am grateful to Tan Sri who has been very helpful to me during the past difficult times.

I have also been in regular contact with the relevant authorities at the top, especially the DPM who has always been positive, open and supportive in tackling various issues.

I plan to be back early next month and if Tan Sri were available, I would be pleased to meet and discuss matters of interest.

In the meantime, may I wish Tan Sri my best regards.

Wassalam.
Yours sincerely
Sgd. (Illegible)
DATO' SAMSUDIN ABU HASSAN.

and the "AMMB Group" refers to Arab Malaysian Merchant Bank of which Tan Sri Azman Hashim is the executive chairman while "Amcorp" refers to Arab Malaysia Corporation Bhd which is the holding company of Tan Sri Azman Hashim's group of companies. That there is a relationship between Fulcrum and Amcorp in that the former is a wholly owned subsidiary of the latter. In exh. "P43", Dato' Samsudin did not express his difficulty or inability to repay the loan facility. That in exh. "P43", Dato' Samsudin gave the picture that he was prosperous rather than having pecuniary problems. That Tan Sri Azman Hashim did not respond personally to exh. "P43" because according to Francis Yong he believed that at that point of time the said Tan Sri was disgusted with the letter in exh. "P43" where Dato' Samsudin boasted of his prosperity but at the same time the said Dato' ignored the fact that there was a loan already in default with Fulcrum. That exh. "P43" was replied by Francis Yong as per exh. "P44" which was dated 26 November 1997 and it was worded in this way:

Fulcrum Capital Sdn. Bhd. (193390-V)
Lot 271, Jln Dua
Off Jalan Chan Sow Lin
55200 Kuala Lumpur
Malaysia
Tel: 03-2210811 Fax: 03-2217793

FACSIMILE
TRANSMISSION

To: Dato' Samsudin Abu Hassan
Facsimile No: 00-2711-8847460
From: Francis W.K. Yong

Company: SMG Holdings Ltd.
Number of pages including cover sheet: 1
Date: November 26, 1997

YBhg Dato',

Reference is made to your fax dated November 24, 1997 to Tan Sri Azman Hashim. I tried calling you but was unable to get through.

Tan Sri Azman wishes to convey his thanks and appreciation for your sincerity and kind words in your fax. He regrets that he is unable to reply your fax directly given his very busy schedule currently, nonetheless, he sends his warmest regards.

As you rightly note, times are indeed trying in the Malaysian corporate sector currently. Ensuing your earnest appreciation of Tan Sri Azman's help extended to you during your difficult times and offering your services to the Arab-Malaysian Group at this juncture, he has requested for you to settle in full the loan of Rahaz Sdn. Bhd. for starters.

As such, we look forward to your early settlement of Rahaz's loan.

Thank you.
Best regards,
Sgd. (Illegible)

The contents of exh. "P44" were prepared according to the instructions of Tan Sri Azman Hashim.

(18) That in exh. "P28", as seen at p. 132 of bundle "A", Fulcrum gave Rahaz Sdn Bhd seven days to come up with an acceptable proposal failing which action will be taken to recover the entire loan amount and that the seven days had expired on 11 December 1997 yet neither Dato' Samsudin nor Rahaz Sdn Bhd responded by that dateline.

Now, it must be borne in mind that the public accountant through Ng Eng Kiat (PW3) signed a certificate of an event of default as seen in exh. "P29" and that certificate was signed using the letterhead of Messrs. Salleh, Leong, Azlan & Co which was reproduced in the early part of this judgment and according to Francis Yong, Fulcrum acted on the certificate of default in exh. "P29" and proceeded to sell the SMG Holdings Ltd shares pledged by Redbridge Assets Ltd in favour of Fulcrum. In exh. "D40", Francis Yong informed Dato' Samsudin and Rahaz Sdn Bhd that Fulcrum as at 15 December 1997 had sold 10,000 shares of SMG Holdings Ltd and in the same letter too Francis Yong emphasised that Fulcrum would continue selling the said shares until it received full payment. For ease of reference, exh. "D40" would now be reproduced:

Fulcrum Capital Sdn. Bhd. (193390-V) Lot 271, Jln Dua Off Jalan Chan Sow Lin 55200 Kuala Lumpur Malaysia Tel: 03-2210811 Fax: 03-2217793	URGENT FACSIMILE TRANSMISSION PRIVATE & CONFIDENTIAL
To: YBhg Dato' Samsudin Abu Hassan/En Mohd Azahari	Company: Rahaz Sdn. Bhd.
Facsimile No: 03-2551082	Number of pages including cover sheet: 1
From: Francis W.K. Yong	Date: December 16, 1997

YBhg Dato'/Azahari,

Re: Interest Outstanding Due From Rahaz Sdn. Bhd. ('Rahaz')

Further to our letter to you dated December 4 under Ref No: 97/fy/623, we regret to note that no effort was made by you to rectify the abovementioned.

> As such, we have proceeded to recover the interest owing and you are hereby informed that we have up to 15/12/97 sold 10,000 shares of SMG Holdings Ltd. ('SMG'). Until we receive full payment for the interest outstanding and satisfactory documentary evidence on the listing prospects of Merbok Hilir Bhd., we will continue selling SMG shares to recover the interest first and if needed to recover the entire loan outstanding to rectify the current default situation of your loan with us.
>
> Sgd. (Illegible).

Francis Yong testified under re-examination that Rahaz Sdn Bhd did not fulfil the conditions precedent set by Fulcrum to enable the latter to consider extending the loan facility by six months until 9 April 1998. To a question whether Fulcrum at any time extended the loan facility dated 9 October 1996 by six months, Francis Yong replied that it was never extended as the conditions precedent for consideration of extensions were never fulfilled. That basically was the re-examination of Francis Yong.

There was an oral application to cross-examine Francis Yong in regard to:

(1) the meeting/telephone conversation;
(2) as well as in regard to exhs. "P43" and "P44".

I allowed that oral application. So, on 1 November 2000, Francis Yong took the stand, once again, and this was what he testified under cross-examination:

(1) He agreed that exh. "P43" did not mention the term loan facility agreement to Rahaz Sdn Bhd.
(2) He agreed that the words "Strictly Private And Confidential" appeared at the top right hand column of exh. "P43".
(3) He agreed that the recipient of exh. "P43" was Tan Sri Azman Hashim.
(4) He agreed that Tan Sri Azman Hashim instructed him to reply to exh. "P43" by way of exh. "P44". He said that he did not speak directly to the said Tan Sri in regard to exhs. "P43" and "P44".
(5) He was asked this question:

> Under cross-examination you were asked regarding a meeting between Dato' Samsudin and a director of Fulcrum scheduled for the week beginning 17 November 1997 and that you had called Dato' Samsudin or Encik Azahari to bring forward the meeting to the afternoon of 17.11.97, do you recall those questions being put to you.

And he answered:

> Yes, I recall those questions.

He was then asked:

> Do you agree that the director of Fulcrum in question is Mr. Jimmy Lim?

And he answered:

> My answer, during cross-examination and re-examination on this matter was that I was not aware of such an event and that this was first brought to my attention during this trial. As such, I cannot truthfully answer this question or who it was.

He was asked:

> Do you agree that on 17.11.97 Mr. Jimmy Lim did not meet with Dato' Samsudin but instead had a telephone conversation with Dato' Samsudin. Do you agree or disagree or you can't recall?

And he answered:

> Again, I have no knowledge of such an incident whether it was a meeting or a teleconversation.

(6) It was put to Francis Yong that a telephone conversation between Jimmy Lim and Dato' Samsudin in fact took place on 17 November 1997. Francis Yong was then asked: "Do you agree or disagree?" And he gave this answer:

> I disagree as I have said that I was not aware of such an incident. I believe the question should be put to Mr. Jimmy Lim instead.

(7) It was put to Francis Yong that in this telephone conversation, Fulcrum had reiterated and confirmed Fulcrum's agreement to Rahaz's proposal to pay RM6.5 million and then the balance interest and the term loan facility would be rolled over until 9 April 1998 and that no legal action would be taken against Rahaz. Do you agree, disagree or don't know? And he gave this answer:

> I disagree to the question as I am not a party to the alleged teleconversation.

Mr. M. Pathmanathan declined to re-examine Francis Yong on these points.

The plaintiffs called their next witness in the person of Ng Eng Kiat (PW3) who was working as a public accountant in December 1997 in the firm of Messrs Salleh Azlan Leong & Co. which firm was the external auditors of Fulcrum. He identified his signature at p. 213 of bundle "A" which was the certificate of an event of default as per exh. "P29". He said that the purpose and effect of exh. "P29" was to certifiy that there was an event of default. The effect of which was to enable Fulcrum to take the necessary action upon the issuance of exh. "P29" in accordance to the right of Fulcrum under the facility agreement. He identified exh. "P5" as the facility agreement and he confirmed that s. 10.01 constituted the events of default as alluded to in exh. "P29". He testified that pursuant to the facility agreement the repayment of the facility was due on 9 October 1997 and that based on his examination of the documents as referred to in exh. "P29", Rahaz Sdn Bhd did not repay the loan by 9 October 1997. According to him too – just by examining the documents as alluded to in exh. "P29", he was able to say that the loan facility was not extended by Fulcrum and that Rahaz Sdn Bhd was in default of the terms and conditions of the facility agreement dated 9 October 1996. He too testified that he issued exh. "P29" based on his independent professional opinion without any inducement, coercion or threat brought to bear on him.

Under cross-examination, Ng Eng Kiat (PW3) had this to say. That it was true that he received a request by letter from Fulcrum dated 11 December 1997 to confirm that Rahaz Sdn Bhd had committed an event of default under the facility agreement dated 9 October 1996. He agreed that his certificate of an event of default was based purely on the documents as mentioned in para. (a) to para. (h) of exh. "P29". He too agreed that he was only given extracts of the facility agreement dated 9 October

1996 between Fulcrum and Rahaz Sdn Bhd. He agreed that he was shown a letter dated 18 November 1997 as per exh. "P26" which was also alluded to at para. (f) of exh. "P29". He disagreed and he said "No" when he was asked whether para. 3 of exh. "P26" was not a request but a confirmation of an agreement to roll over to 9 April 1998. He said that:

> Basically when we came up with the certificate of an event of default, our certificate is premised on the reading of the various documents and not on a single document.

It was put to him that by looking at para. 3 of exh. "P26" only, that it was not a request but rather an agreement to roll over to 9 April 1998 and his reply was in this fashion:

> On the basis of the English as outlined in the 3rd paragraph, it says, 'As agreed.' An agreement, in our view, must be between two parties. It cannot just be taken as an agreement purely from the author of the letter.

He agreed that he had no knowledge of what had transpired between Francis Yong and Dato' Samsudin on 14 November 1997. It was put to him that the third paragraph of exh. "P20" was a confirmation of an agreement reached on 14 November 1997 between Francis Yong and Dato' Samsudin and he replied:

> I am not too sure whether I can answer yes or no. Because I can't speculate on an agreement between two parties at a meeting for which I was not aware of.

It was also put to him whether it was possible that there was an agreement reached on 14 November 1997 as confirmed at paragraph three of exh. "P26" and he replied:

> I cannot answer the question because I cannot speculate on the agreement between the two parties.

He was questioned:

> You agree that reading paragraph 3 of "P26" (page 130 of bundle "A") that this paragraph confirms an agreement to roll over?

And he replied in this manner:

> I am in no position to agree or disagree.

In regard to para. (h) of exh. "P29" he said that it was related to exh. "P31A". He said that he was not given a copy of exh. "P23". He said that initially he was not given a copy of exh. "P27" but "when we went to check the premises of my client ie, Fulcrum, to check all the relevant documents and whatever documents relating to this issue, we were given a copy of this letter." He said that he went to his client's premises on 11 December 1997. He agreed that a description of exh. "P27" did not appear in the certificate as per exh. "P29" but he clarified that:

> ... however when we visited the premises of Fulcrum we requested for a copy of the letter because the letter dated 4.12.97 from Fulcrum (P28) at page 132 of bundle 'A' makes reference to the said letter i.e. P27 of page 131 of bundle 'A'.

He agreed that a copy of exh. "D38" from Fulcrum to Dato' Samsudin was not described in the certificate in exh. "P29". He too agreed that exh. "D41" was not described in the certificate in exh. "P29" but he sought to explain that that was the

first time he saw exh. "D41". He also agreed that he did not view exh. "D40" when he prepared the certificate in exh. "P29" and he explained that that was the first time he saw exh. "D40". He said that his certificate in exh. "P29" made references to various documents tabled therein. He said that exh. "P26" was not looked at in isolation. In regard to paras. 3 and 4 of exh. "P26" as to whether they referred to an agreement, he said that he was not in a position to know whether there was such an agreement or otherwise. He stressed that he was not aware of any agreement. He was repeatedly asked as to whether paras. 3 and 4 of exh. "P26" refer to an agreement irrespective of whether or not he was aware that there was in fact an agreement and his reply was very candid. This was what he said:

> I am still not in the position to answer the question principally because an agreement, to my knowledge, should have consent between two parties. Therefore just by looking at paragraphs 3 and 4 and the English adopted therein, I still can't answer that question.

He said that just by looking at exh. "P26" he could not say that there was no request contained therein because according to him the last paragraph of exh. "P26" contained the words, "Your indulgence", which would tantamount to a request.

It was put to Ng Eng Kiat (PW3) under cross-examination that exh. "P26" did not contain any request but it referred to and confirmed in writing an agreement to roll over the balance interest together with the principal for a further period of six months expiring on 9 April 1998 and he replied that he would like to maintain his stand that he was in no position to know whether there was any agreement. He reiterated that he was still in a position to certify as per exh. "P29", on the basis of the documents as enumerated in exh. "P29", an event of default. He stuck to his version and that was that he would still be able to certify an event of default. He was asked this crucial question:

> Would you agree with me that certifying an event of default is a question of law?

And he gave this interesting answer:

> I want to answer the question not from a legal point of view. From an examination of the documents as an auditor I am able to establish positively when a facility is due, whether it has been paid or not. It is a matter of fact. I look at the documents, I look at the facts enumerated in P29, I look at the statement of account as mentioned in P29 and a reading of section 10.01 of the facility agreement and my conclusion can be reached on the basis of reading the documents.

It was put to him that he was in no position to certify an event of default. He answered in this way:

> I disagree with that.
>
> I am an accountant by profession. I have a professional qualification issued by the Malaysian Association of Certified Public Accountants and I am licensed by the Ministry of Finance to carry out public accounting work. I have 25 years experience in the audit line.

He was then asked the following question:

> You did not in preparation of P29 personally handled the audit to certify whether there was an event of default?

And he gave the following pertinent answers:

> In a public accounting firm very much like in most professional organization we do not personally go through the actual work procedures. We have teams of qualified personnel and assistants to conduct the fiscal aspect of audit work i.e. by going to the premises of the client, but we maintain quality control at various levels in our organisation i.e. the work is vetted by our managers and partners engaged on the assignments. Therefore before any certificate or audit report is issued by our office the work would have been properly confirmed and checked.
>
> I cannot say that I did not get involved in the examination of the documents. I got involved in the examination of the documents before I signed P29.

It was put to him that his certificate in exh. "P29" was premature and or wrong and he categorically disagreed thereto.

Under re-examination, this was what Ng Eng Kiat (PW3) said:

That he was able to confirm that the issuance of the certificate in exh. "P29" was premised on the basis of the documents made available to his firm. He said that his officers and assistants went to Fulcrum's office and examined their file prior to the issuance of exh. "P29". He agreed that exh. "P28" at p. 132 of bundle "A" was a letter dated 4 December 1997 that was alluded to at para. (g) of exh. "P29". He agreed that the letter mentioned in para. 1 of exh. "P28" bearing the date 18 November 1997 can be found in exh. "P27" as seen at p. 131 of bundle "A". He agreed that before issuing exh. "P29", he had examined and obtained a copy of exh. "P27" which was Fulcrum's letter dated 18 November 1997. He had satisfied himself before issuing exh. "P29" whether or not exh. "P27" of p. 131 of bundle "A" admitted or denied the contents of exh. "P26" of p. 130 of bundle "A". Exhibit "D41" was an enquiry to Rahaz Sdn Bhd relating to their listing proposal of Merbok Hilir Bhd in view of the announcement by the Finance Minister to freeze new listings. So, even if he had sight of exh. "D41" on 11 December 1997 it would not have made any difference to his certification in exh. "P29". He was shown exh. "D38" and he said that the gist of this letter was basically to take note of Rahaz Sdn Bhd's request to defer interest payment thereby giving Rahaz Sdn Bhd an ultimatum to settle the interest by 15 November 1997. He categorically stated that Rahaz Sdn Bhd did not meet the dateline of 15 November 1997 to settle the interest. According to him had he had knowledge of exh. "D38" on 11 December 1997, it would not have made any difference to his certification. He said that today – meaning 1 November 2000, was the day that he was seeing exh. "D40" for the very first time. He said that exh. "D40" was dated 16 December 1997 and he confirmed that exh. "D40" was not in existence when he made the certification in exh. "P29" on 11 December 1997. He agreed that in exh. "P29" he referred to one event of default and that was an event of default under s. 10.01 of the facility agreement. According to him, the event of default was this: that if the borrower shall fail to pay to the lender any sum payable by the borrower hereunder after the said shall have become due whether formally demanded or not. And that constituted the event of default. He confirmed that in exh. "P29" he stated that based on the "documents/ correspondence", the event of default had occurred in accordance with the terms of the facility agreement dated 9 October 1996 between Fulcrum and Rahaz Sdn Bhd. He said that he had satisfied himself and he found that Fulcrum did not grant an

extension of the loan. He was asked a very pertinent question and it was like this:

> Did you merely sign P29 without personally examining the documents or did you examine and evaluate all the documents therein and were fully appraised before you signed P29?

And he answered in this way:

> Yes, before I signed P29 I examined all the documents tabulated therein and also had discussions with my manager.

He was then asked:

> Do you today after having sight of P29 and all other documents, are you convinced that P29 is correct or that you entertained any doubts/misgivings?

And he confidently answered:

> I fully stand by my certification in P29 and I can confirm that my certification is correct.

The plaintiffs' next witness would be Dato' Jimmy Lim (PW4). He testified under examination-in-chief that he was a director of Fulcrum in the years 1996, 1997, 1998. He said that he left or resigned from Fulcrum as a director somewhere in January 1999. He said that sometime in October 1996, Fulcrum advanced to Rahaz Sdn Bhd a term loan facility in the sum of RM76,219,512. He said that he knew Dato' Samsudin as the director and the owner of Rahaz Sdn Bhd. He confirmed that Dato' Samsudin is a guarantor for Rahaz Sdn Bhd in respect of the facility. He was asked a very pertinent question which was:

> Did you speak to Dato' Samsudin over the telephone on 17.11.97?

And he gave a spontaneous reply:

> No YA; No My Lord.

He was then asked:

> It is Dato' Samsudin's instructions to his lawyers that on 17.11.97, you had a telephone conversation with him during which conversation you agreed to extend the term loan facility that Rahaz had taken from Fulcrum for 6 months until 9.4.98. Is this true?

And his reply was short and sweet:

> No My Lord.

He said that he did not, at any time, convey to Dato' Samsudin that Rahaz Sdn Bhd's loan facility with Fulcrum was extended by six months.

On being cross-examined, Dato' Jimmy Lim had this to say. He agreed that exh. "P20" as seen at p. 123 of bundle "A" was a letter from Rahaz Sdn Bhd. He said that exh. "P20" was a request for a roll over of the term loan facility for a further six months. He agreed that the second paragraph of exh. "P21" as seen at p. 124 of bundle "A" referred to him as one of the directors of Fulcrum. He agreed that exh. "P21" conveyed to Rahaz Sdn Bhd that partial approval of the loan extension

had been received but he said that there was a dateline and that was on or before 9 October 1997. He agreed that partial approval was given subject to the dateline on or before 9 October 1997. He stated that his signature appeared at p. 126 of bundle "A" in regard to an exhibit marked as "P22".

He agreed that in exh. "P22" Fulcrum agreed to grant the extension subject to the conditions as alluded to in (i) and (ii) thereof. He agreed that the conditions would be in regard to the payment of RM14,344,512 payable within seven days from 10 October 1997 and that this sum was mentioned in (i) and (ii) of exh. "P22". He agreed that the extension was for six months from 9 October 1997 provided the sum of RM14,344,512 was paid. He agreed that exh. "P23" of p. 127 of bundle "A" was a letter of request from Dato' Samsudin on behalf of Rahaz Sdn Bhd to defer the payment of interest to the end of October 1997. And that by way of exh. "P24" of p. 128 of bundle "A", Rahaz Sdn Bhd enclosed a cheque for RM1.5 million. According to him, Fulcrum did bank in the cheque and that the cheque was good. He agreed that, according to exh. "P22", the time period of seven days ended on 17 October 1997.

It was put to Dato' Jimmy Lim the following episode:

> That what you are saying now that Fulcrum had not decided to wait until end of October 1997, that is untrue and that Fulcrum's board of directors had decided to wait till end of October 1997 as contained in page 127 of bundle 'A'.

and he gave the following answers:

> I will give you what I thought my answer was by referring to page 128 of bundle "A" – i.e. "P24". What I had done was to admit that the cheque of RM1.5 million was received and it was banked in and no letter of demand was issued for the balance sums because as Fulcrum had decided to exercise some compassion so no dateline was set by us in writing or by mention of words of any datelines not even in October 1997 as suggested by learned counsel.

He agreed that at paragraph two of exh. "P26" there was reference to the payment of RM6,500,000 from Rahaz Sdn Bhd to Fulcrum as being part payment of the interest due. He agreed that the words "interest due" appearing at the second paragraph of exh. "P26" relate to the sum of RM14,344,512 as alluded to in exh. "P24". He was then asked:

> Had Fulcrum made a demand as at the date in P26 for the entire sum of RM76,219,512.00?

and his reply was like this:

> My Lord, at this stage, I am not sure whether I could say that. I was not attending to the affairs of Fulcrum any more because this was the height of the Asian economic crisis which affected Malaysia very badly and I had left all my administrative matters to the then senior manager Lum Sing Fai and his legal team.

He agreed that Francis Yong was part of the team and that he had no contact with Dato' Samsudin until well into January or February 1998 ie, three months later. However, he agreed that he was one of the directors involved in giving extension to the approval of the loan and he too agreed that the amount at stake was large.

It was put to him that he had a telephone conversation with Dato' Samsudin on or about 17 November 1997 where the issue of the roll over or an extension of the loan was discussed and he replied in the negative and he also said that there was no such conversation. It was again put to him that on 17 November 1997 he had agreed with Dato' Samsudin that the term loan for Rahaz Sdn Bhd would be rolled over for six months upon payment of the sum of RM6,500,000 and he replied in the negative and he continued to say that there was no agreement to roll over because he had no conversation with Dato' Samsudin at all. However, he said that he had spoken to Dato' Samsudin only at the inception of the loan.

He agreed that according to exh. "P27" as seen at p. 131 of bundle "A", the sum of RM6.5 million was accepted by Fulcrum. He believed that the two cheques were honoured. He was referred to paragraph two of exh. "P27" and he was asked whether he agreed that Fulcrum had stated that the conditions of (i) and (ii) of exh. "P22" had been accepted by Rahaz Sdn Bhd and he replied in this manner:

> As I said, I was no more directing the show and I believe this to be legal and administrative matters pertaining to the collection of debts. I can read and understand the letter but I cannot give an opinion. I was not present at the time of writing.

He was asked:

> Do you agree that as at the date of 18.11.97 (P27) and 4.12.97 (P28), you had spoken to Dato' Samsudin about these two letters?

and his reply was:

> No, I was busy.
> He may have attempted to call me but I certainly did not speak to him.

It was put to him that he had conveyed to Dato' Samsudin Fulcrum's agreement to roll over for six months upon payment of RM6.5 million and he was given the option whether to agree or disagree. He chose to disagree.

Under re-examination, Dato' Jimmy Lim testified that the only occasion when he spoke to Dato' Samsudin was at the inception of the loan and that would be sometime in late 1996. However, he agreed that he did speak to Dato' Samsudin again and this was in late January or February 1998.

He categorically stated by way of a re-confirmation that he did not converse with Dato' Samsudin on 17 November 1997. He too testified that he did not, at any time, inform Dato' Samsudin that Rahaz Sdn Bhd's term loan had been extended for six months. In regard to exh. "P24" of p. 128 of bundle "A", he said that Fulcrum had received the cheque amounting to RM1.5 million which was tendered by Rahaz Sdn Bhd. To his knowledge, there was no written letter where Fulcrum had informed Rahaz Sdn Bhd that Fulcrum was accepting the conditions as stated in exh. "P24".

He was then asked this question:

> Do you also confirm that Fulcrum banked in 2 cheques totalling RM6.5 million that Rahaz forwarded on 18.11.97?

And he replied in this manner:

> I must reiterate that by 18.11.97, I was no more leading matters in this case as I was busy with other crisis of the group. I can only confirm by knowledge that this sum was received. I cannot give any opinion on the motives of this letter upon the receipt of the RM6.5 million cheque.

He was able to confirm that at the time when these two payments were received on 21 October 1997 and 18 November 1997 (exhs. "P24" and "P26"), Rahaz's loan with Fulcrum was already in default. Finally, he was asked this question:

> Can you confirm that the conditions that were imposed by Fulcrum prior to giving the loan extension i.e. payment of RM14,344,512.00 were never fulfilled by Rahaz?

And his reply was:

> Yes, my Lord. In order for the loan to be rolled over, the full sum of RM14,344,512.00 had to be fully paid. I must say that any part payment received would not be good enough and should not be regarded by Rahaz as conditions for rolled over. At that time, Fulcrum needed every cent that it could receive. It could not afford any roll overs.

The next witness for the plaintiffs was KC Loh (PW5). He was the last witness for the plaintiffs. Under examination-in-chief, he testified that he still held the post of a senior manager of Fulcrum and he too held the same post in October 1996. As a serving officer of Fulcrum, his evidence was indeed interesting. He testified that in October 1996, Fulcrum extended a term loan to Rahaz Sdn Bhd which was to mature one year from the date of disbursement and that would be on 9 October 1997. He identified the facility agreement as exh. "P5" as seen at p. 20 of bundle "A" where the total loan facility was for RM76,219,512. He testified that Rahaz Sdn Bhd did not repay Fulcrum the loan on or before 9 October 1997. He said that Rahaz Sdn Bhd wrote a letter dated 23 September 1997 marked as exh. "P20" to Fulcrum requesting for a roll over of the facility for six months. In response thereto, Fulcrum sent a facsimile transmission dated 6 October 1997 as per exh. "P21" and a letter dated 10 October 1997 as per exh. "P22". He was shown exh. "P26" – a letter from Rahaz Sdn Bhd to Fulcrum dated 18 November 1997, and he said that he remembered receiving the said letter. He explained that it was despatched to Fulcrum by hand and it was received by him and Francis Yong on 18. November 1997. He said that he was shocked on receiving exh. "P26" and that he had discussed with Francis Yong and raised the question of whether the contents of exh. "P26" were true since both of them were not in a position to agree to an extension without obtaining the approval from the management. He stressed that Francis Yong was his subordinate in Fulcrum. He too stressed that both he and Francis Yong were in no position to grant any extension or approve any loan whatsoever. He testified that the loans committee of Fulcrum never agreed to extend the loan on payment of RM6.5 million by Rahaz Sdn Bhd. He said that he checked with Francis Yong in regard to the contents of exh. "P26" and he said that Francis Yong was very angry with the way the letter was drafted. He testified that both he and Francis Yong then set about drafting a reply to counter the contents of the letter. He categorically stated that Francis Yong denied the contents of the letter in exh. "P26". In his own words, this was what he said:

> We drafted an urgent reply on the same day while holding back the despatch boy and on completion of the reply we immediately pass it to the delivery boy for delivery to Rahaz.

and that reply can be seen in exh. "P27" which was dated 18 November 1997 as seen at p. 131 of bundle "A". According to him exh. "P27" denied the contents of the letter in exh. "P26". He explained that the authority to extend loan in Fulcrum rest with the loans committee comprising of Mr. Soo Kim Wai, Dato' Jimmy Lim and Tan Sri Azman Hashim. He said that to his knowledge Francis Yong had never exceeded his authority whilst being employed with Fulcrum. He testified that Rahaz Sdn Bhd did not respond to Fulcrum's letter in exh. "P27" and neither did Rahaz Sdn Bhd reply to Fulcrum's subsequent letter in exh. "P28" as seen at p. 132 of bundle "A". According to him, Rahaz Sdn Bhd did not deny, at any time, the contents of Fulcrum's letter in exh. "P27". He explained that in exh. "P28", Fulcrum conveyed the message that it had no alternative but to give Rahaz Sdn Bhd a final ultimatum to fully settle the loan and the dateline was seven days from 4 December 1997 and that would expire on 11 December 1997. He said that Rahaz Sdn Bhd did not respond to the dateline as set by Fulcrum. He was able to confirm that by 11 December 1997 Fulcrum external auditors Salleh Leong Azlan & Co had confirmed that an event of default in accordance with the terms and conditions of the facility agreement dated 9 October 1996 between Fulcrum and Rahaz Sdn Bhd had occurred. Essentially the certificate was to certify that an event of default had occurred and as required by the power of attorney in exh. "P8" as reflected at p. 85 of bundle "A". That power of attorney in exh. "P8" was in relation to the RM65 million SMG Holdings Limited shares pledged by Redbridge Assets Ltd which formed part of the security to the loan. The pertinent parts of the power of attorney in exh. "P8" would be cl. 1 and the Schedule thereto. The donor of the power of attorney in exh. "P8" was Redbridge Assets Ltd. According to him, exh. "P7" of p. 71 of bundle "A" was in relation to the memorandum of charge of shares of third party in favour of Fulcrum for the RM65 million SMG Holdings Limited shares as reflected in the Schedule thereto. Clause 12.1 of exh. "P7" gave Fulcrum the power to sell or deal with the pledged shares and it was this very clause that empowered Fulcrum to sell the shares in the event of default as defined in the facility agreement. Fulcrum exercised its right to sell the SMG Holdings Limited shares pledged in its favour and, according to him, Fulcrum sold a total of RM2,477,700 SMG shares. He said further that as the shares were held in South Africa and listed in the Johannesburg Stock Exchange, Fulcrum had to instruct its stock broker by the name of Fleming Martin Securities Ltd in South Africa to execute the sale in South Africa. He said that Fulcrum commenced selling the SMG Holdings Limited shares in the Johannesburg Stock Exchange on 12 December 1997. He said that under cl. 12.3(a) of exh. "P7", Fulcrum shall not be liable to account or liable for any loss or damage resulting from the disposal of the SMG Holdings Limited shares. Even under cl. 12.3(b) of exh. "P7", Redbridge Assets Ltd, as the chargor, had waived any right to make any claim or counterclaim against Fulcrum in respect of the manner or the time or the price at which the shares were to be disposed of. Clause 12.1 of exh. "P7" provided that all moneys received from such sale shall be applied in the manner specified in the facility agreement. Interestingly, he said that under s. 11.19 of the facility agreement all moneys received pursuant to the

provisions of the security documents be placed and kept to the credit of the suspense account for as long as the lender thought fit.

In the course of the examination-in-chief of KC Loh (PW5), a new bundle of documents marked as bundle "D" was tendered with the concurrence of the defendants' counsel. At p. 1 to p. 2 of bundle "D", this witness explained that these were the statements summarising the number of SMG Holdings Limited shares sold by Fleming Martin Securities Ltd together with the sums received from the sale and the dividends received from the SMG Holdings Limited shares and the Merbok Hilir Bhd shares.

According to him the original share certificate of 65 million SMG Holdings Limited shares was forwarded to Fleming Martin Securities Ltd by letter dated 28 November 1997 as seen at exh. "P46" of bundle "D" and that letter was worded as follows:

Our Ref: 97/sms/613
28 November 1997
Fleming Martin Securities Ltd
9th Floor, The Stock Exchange
Diagonal Street
Johannesburg 2001
South Africa
Attention: Mr Craig France

Dear Sir

OPENING OF SHARE TRADING ACCOUNT AND ORIGINAL SHARE CERTIFICATE OF 65,000,000 SMG HOLDINGS LIMITED

We refer to the recent correspondence between your Mr Craig France and our Mr Francis Yong on the above matter.

We enclose herewith one (1) original share certificate of 65,000,000 SMG Holdings Limited shares under share certificate no: 0000231 registered under the name of Redbridge Assets Limited for your safe keeping and further action.

Also, we enclose herewith all the relevant documents required for opening of share trading account with you:

(i) Duly executed Managed Account Mandate form;
(ii) Directors' Resolution of Fulcrum Capital Sdn Bhd dated 27/11/97 approving the opening of a Security Trading Account;
(iii) One (1) certified true copy of Authorised Specimen Signatures;
(iv) One (1) certified true copy of each of Form 24 dated 13/4/95, Form 49 dated 23/9/97 and Memorandum and Articles of Association of Fulcrum Capital Sdn Bhd; and
(v) Letter of Indemnity for Managed Account Mandate.

Kindly acknowledge receipt by signing and returning the duplicate copy of this letter to us.

Thank you.

Yours faithfully
FULCRUM CAPITAL SDN BHD

Sgd. (Illegible) Sgd. (Illegible)
LOH KAM CHUIN FRANCIS YONG WING KHEONG
Senior Manager Manager
Enclosure:

That on 4 December 1997, Fulcrum transmitted to Fleming Martin Securities Ltd the original duly executed transfer form of 65 million SMG Holdings Limited shares and an office copy thereof can be seen at exh. "P47" at p. 4 of bundle "D". He said that Fleming Martin Securities Ltd commenced selling the SMG Holdings Limited shares on 12 December 1997 and that the sale continued up to 21 May 1998. He then proceeded to explain the details of the sale transactions by referring to the various contract notes which were then marked as exhs. "P48 (i)" to "P48 (XLVI)" totalling 46 contract notes altogether. He explained that the total proceeds in rand from 12 December 1997 to 21 May 1998 in gross came up to 3,294,511.35 rand. He again explained that Fulcrum's remisier Fleming Martin Securities Ltd stopped selling the SMG Holdings Limited shares on 21 May 1998 because Dato' Samsudin had obtained a court order injuncting Fulcrum from selling the shares of SMG Holdings Limited. Alluding to exh. "P45" at p. 2 of bundle "D", he explained that just below the total proceeds of 3,294,511.35 the sum of 130,000 rand showed the stamp duty that was paid on the transfers of 65 million SMG Holdings Limited shares from Redbridge Assets Ltd to Fulcrum. In regard to p. 2 of bundle "D", he explained that on 10 July 1998 a total of 1,250,446 million rand was received as dividends on the 62,522.300 unsold SMG Holdings Limited shares and that the figure of 906,172.09 rand showed the interests earned from the sales proceed and the dividends proceed. He confirmed that the total sales proceed and dividends proceed and interests earned as at 10 August 1999 would come up to 5,321,129.44 rand. By way of a letter dated 25 May 1998 Fulcrum's solicitors Messrs Iza Ng Yeoh & Kit informed Rahaz Sdn Bhd about the sale of 2,477,700 shares of SMG Holdings Limited at 3,164,511.35 rand and that letter was marked as exh. "P50" as seen at p. 52 of bundle "D". Exhibit P50" was worded in this way:

> Dear Sirs,
>
> RAHAZ SDN. BHD. ['RAHAZ']
> TERM LOAN OF RM76,219,512.00
> REFERENCE NO. TL/165/09/96/12
>
> We act for Fulcrum Capital Sdn. Bhd. of 1st Floor, Lot 271, Jalan Dua, Off Jalan Chan Sow Lin, 55200 Kuala Lumpur in the above matter.
>
> Our clients instruct us that pursuant to a Facility Agreement dated 9 October 1996, you had covenanted to repay the above Facility within twelve (12) months of the date of first drawdown, that is, on or before 9 October 1997.
>
> As at 22 May 1998, the outstanding balance of the above Facility stands at RM76,766,559.63 with further interest accruing thereon at 18% per annum from 23 May 1998 until the date of full settlement.
>
> WITHOUT PREJUDICE to our clients' earlier demand *vide* our letter dated 31 December 1997, TAKE NOTICE that our clients hereby require you forthwith to pay or cause to be paid to our clients the abovesaid sum of RM76,766,559.63 plus interest accruing thereon together with our notice fee of RM575.00 within seven (7) days from the date hereof, failing which, legal proceedings to enforce and recover payment thereof will be taken against you without further reference.
>
> Our clients further instruct us to inform you that as a result of the sale of 2,477,700 shares of SMG Holdings Ltd which were pledged to our clients as security for the above Facility, there is presently a sum of Rand 3,164,511.35 which has been placed in suspense account. Credit for the said amount will be given upon full settlement of the amount owing to our clients as aforesaid.

Yours faithfully,
for IZA NG YEOH & KIT
Sgd. (Illegible)
ANGELINE NG
cc. client [Attn: Mr Francis Yong].

He then proceeded to explain the statement of accounts from Fleming Martin Securities Ltd as seen in exh. "P51" of pp. 53 to 54 of bundle "D" and this was what he said. That the statement of accounts showed the unsold balance of the SMG Holdings Limited shares at 62522300 and that under column 'trading', a sum of 316 4511.35 rand showed the net proceeds from the sale of 2,477,700 SMG Holdings Limited shares. That on 3 August 1999 as per exh. "P52", Fulcrum not only instructed Fleming Martin Securities to remit the proceeds from the sale of 2,477,700 SMG Holdings Limited shares in Malaysian ringgit less all costs and charges to Fulcrum's account with Arab Malaysian Bank Berhad but also any dividends that were received. He said that this was done and that exh. "P53" reflected the transfer of the proceeds of sale and dividends in Malaysian ringgit to Fulcrum's account. Looking at exh. "P53" he explained that the amount received by Fulcrum in Malaysian ringgit on 27 August 1999 totalled RM3,243,591.81 thus giving the conversion rate of around 60 sen per 1 rand. He identified exh. "P54" of p. 58 of bundle "D" as the credit advice from Malayan Banking Berhad for RM3,243,591.81 plus commission of RM5 which was dated 26 August 1999. He also identified exh. "P55" as seen at p. 59 of bundle "D" which showed that Fulcrum was in receipt of the sum of RM3,243,586.81 less RM5 as commission on 27 August 1999. He stated that exh. "P56" of p. 60 of bundle "D" would show the receipt by Fulcrum of RM540,000 in respect of 6,750,000 shares. He then identified exh. "P57" of p. 62 of bundle "D" as the credit advice for the payment of RM540,000. He again identified exh. "P58" of p. 63 of bundle "D" as Fulcrum's statement of account with Arab Malaysian Bank dated 30 April 2000 showing the sum of RM540,000 which Fulcrum had received. He said that in exh. "P45" at p. 2 of bundle "D" on the last line at the bottom of the page under the date 19 April 2000, he was able to confirm that on that day Fulcrum received the sum of RM1,799,000 being dividends received on 22,500,000 Merbok Hilir Bhd shares. In regard to exh. "P59" as seen at p. 65 of bundle "D", he said that it was a letter from Amsec Nominees (Tempatan) Sdn Bhd to Fulcrum enclosing a cheque of RM1,799,000 on 22,500,000 million Merbok Hilir Bhd shares. He identified exh. "P60" of p. 66 of bundle "D" as the payment voucher for RM1,799,000. He too identified exh. "P61" of p. 67 of bundle "D" as a copy of the cheque from Amsec Nominees (Tempatan) Sdn Bhd for the sum of RM1,799,000 in favour of Fulcrum and he said that the sum had been banked in. He identified exh. "P62" of p. 68 of bundle "D" as the pay in slip for RM1,799,000. He said that exh. "P58" at p. 63 of bundle "D" was the statement of account of Fulcrum dated 30 April 2000 which showed a sum of RM1,799,000 being banked in. In regard to exh. "P45" of p. 2 of bundle "D", he said that at the last three columns at the bottom of the page a sum of RM5,582,591.81 was recorded and that figure showed the total proceeds which Fulcrum received from the SMG Holdings Limited and Merbok Hilir Berhad dividends. He then identified a letter from Tunku Jaafar Nong dated 18 May 2000 marked as exh. "P63" as seen at p. 69 of bundle "D" and he said that this letter was an offer to buy 29.25 million shares in Merbok

Hilir Bhd for the total consideration of RM67,275,000. He further said that pursuant to a court order dated 22 August 2000, Fulcrum was authorised to sell 29.25 million Merbok Hilir Bhd shares that were pledged to Fulcrum. He too testified that pursuant to that court order, Fulcrum entered into a sale and purchase agreement dated 28 August 2000 with Kilang Bumi-Aluminium Sdn Bhd to sell the 29.25 million Merbok Hilir Bhd shares that were pledged to Fulcrum and that agreement can be seen at exh. "P64" of p. 232 of bundle "A". He explained that the total purchase price of 29.25 million Merbok Hilir Bhd shares came up to RM67,275,000 and that the sale and purchase agreement had been completed and the full purchase price paid. There was an overpayment and exh. "P65" as seen at p. 247 of bundle "A" reflected that and it was worded in this way:

5 September 2000

Kilang Bumi-Aluminium Sdn Bhd
Lot 4 Jalan Pekeliling
Pasar Gudang Industrial Estate
81700 Pasir Gudang
Johor

Dear Sir

PAYMENTS RECEIVED

We refer to your letter dated 4 September 2000 on the above matter and attached herewith copies of the Arab-Malaysia Bank Berhad's Credit Advice for Fulcrum Capital Sdn Bhd.

The total Ringgit Malaysia received and the amount overpaid is computed below:-

Received on 30/8/2000	RM 1,055,670.82
	RM 5,696,193.04
Received on 1/9/2000	RM60,803,507.87
	RM67,555,371.73
Total consideration for Purchase	RM67,275,000.00
Excess payment	RM 280,371.73
Stamping charges incurred	RM 40.00
Excess payment to be refunded	RM 280,331.73

Would appreciate if you could advise us as to where the excess payment is to be paid to as soon as possible.

Thank you.

Yours faithfully
FULCRUM CAPITAL SDN BHD

Sgd. (Illegible)	Sgd. (Illegible)
LUM SING FAI	LOH KAM CHUIN
Executive Director	Senior Manager

He proceeded to identify exhs. "P66A, B, C" of p. 248 of bundle "A" as credit advice from Arab Malaysian Bank Berhad in favour of Fulcrum for the sum of RM67,555,371.73 and these sums were then placed by Fulcrum in fixed deposit with Arab Malaysian Bank Berhad. He also proceeded to identify his signature above his

name in exh. "P65". He produced the latest statement of account dated 31 October 2000 showing the amount owing by Rahaz Sdn Bhd to Fulcrum after taking into consideration all the payments thereto and it was accordingly marked as exh. "P67". He testified that after taking into consideration the amounts paid by Rahaz Sdn Bhd and also the proceeds from the sales of the SMG Holdings Limited shares and dividends received from the Merbok Hilir Bhd shares and other interests earned, the amount owing to Fulcrum as at 31 October 2000 was RM102,149,359.69. He then explained in detail just by looking at exh. "P67" as to how he arrived at the figure of RM102,149,359.69 and I need not dwell on it here. Suffice for me to say that this witness was very thorough and meticulous. He then clarified that the payments of RM1.5 million on 21 October 1997 and RM6.5 million on 19 November 1997 were not only sufficient to set off part or the whole of the interest outstanding, it was also sufficient to reduce part of the principal. He confirmed that after 19 November 1997 the interest at 18% per annum was rightly computed on the outstanding sum of RM70,380,272.95. In regard to note 2 at the bottom of exh. "P67", he explained that it showed the daily interest on the loan as incurred by the borrower and it amounted to RM34,613.25 daily. In regard to the three payments that were received as shown at the bottom of exh. "P67" where Fulcrum received from Fleming Martin Securities Ltd amounting to RM3,243,591.81 and the dividends of RM540,000 and RM1,799,000, he said that these amounts were used to set off part of the interests that had been incurred. He said that the facility agreement in exh. "P5" dated 9 October 1996 provided for the manner in which the monies that were received were to be applied. He referred to s. 10.04 of the facility agreement and he explained how the moneys received by the lender could be used and I need only to reproduce that section here:

Section 10.04 **Proceeds of Sale**

All moneys received by the Lender from any proceeding instituted or step taken herein shall, subject to statutory priorities (if any) be applied by the Lender in the following manner:-

FIRSTLY	in payment of all costs charges and expenses incurred and payments made by the Lender under the provisions of the Security Documents;
SECONDLY	in or towards payment to the Lender of all other moneys due and remaining unpaid under any or all of the Security Documents, other than the Facility and interest;
THIRDLY	in or towards payment to the Lender of all interest then accrued and remaining unpaid in respect of the Facility or the balance thereof for the time being owing;
FOURTHLY	in or towards payment to the Lender of the principal sum due and remaining unpaid under the Facility;
FIFTHLY	in payment to the person or persons entitled thereto of the balance, if any.

PROVIDED ALWAYS that if the Lender shall be of the opinion that the sums so recovered or received may prove deficient, payments may be made to the Lender on account of principal before interest, commissions, fees and or discount charges but such alteration in the order of payment shall not prejudice the right of the Lender

against the Borrower to receive the full amount to which the Lender would have been entitled if the primary order of payment had been observed or any lesser amount which the sum ultimately realised from the security may be sufficient to pay.

In regard to the statement of claim in bundle "C" of p. 81 at para. 19, KC Loh said that the sum of RM70,380,272.95 was at that time the principal sum that was owing. He confirmed that the sum of RM79,196,125.22 appearing at para. 21(a) of the statement of claim at p. 81 of bundle "C" was the sum due and owing as at 31 July 1998 inclusive of interest. He too confirmed that the interest to be computed from 1 August 1998 on 18% per annum on the outstanding principal of RM70,380,272.95 can be seen at para. 21(b) of the statement of claim at p. 82 of bundle "C". He also confirmed that it was correct that the sum due and owing by Dato' Samsudin as at 31 December 1997 inclusive of interest was RM71,838,012.31 and that this was consistent with exh. "P31B" as reflected at p. 122 of bundle "A". He explained further that by looking at exh. "P31B" he was able to confirm that the principal outstanding was RM70,380,272.95 and according to him this amount was the same as in exh. "P67" and that there was an interest element of RM1,457,739.35 for 42 days from 20 November 1997 to 31 December 1997. Hence, according to him, as at 31 December 1997 the total outstanding would be RM71,838,012.30 as alluded to in exh. "P31B". He said that it was correct as alluded to in para. 20 of the statement of claim at p. 15 of bundle "C" that payment for the sum of RM71,838,012.31 with interest accruing from 1 January 1998 at the rate of 18% per annum until the date of full settlement and that this was for the principal sum of RM70,380,272.95. He said that at para. 22 of the statement of claim at p. 15 of bundle "C", the plaintiff claimed for the sum of RM71,838,012.31 and this was the amount as at 31 December 1997 and interest accruing at 18% per annum calculated on a daily basis from 1 January 1998 till the date of full settlement and that the word "thereof" appearing at para. 22 would mean that an interest accruing thereon should refer to RM70,380,272.95. He confirmed that Dato' Samsudin owed the plaintiff the sum as claimed in the statement of claim in the Samsudin Action. He also confirmed that Rahaz Sdn Bhd owed Fulcrum the sum as claimed in the Rahaz Action. Of pertinence would be his assertions that Rahaz Sdn Bhd failed to fulfil the conditions precedent as required by Fulcrum in order to enable Fulcrum to grant an extension of time of six months. He also asserted that the loan facility was not extended for six months until 9 April 1998.

KC Loh was then cross-examined and he certainly withstood the gruelling cross examination. This was what he said under cross-examination. He disagreed that the sum of RM70,380,272.95 at 18% per annum as alluded to in exh. "P67" was the interest in that section capitalising on the principal. He said that the sum of RM70,380,272.95 can be seen at the last column third line in exh. "P31A" as seen at p. 121 of bundle "A" and that the same sum can also be seen in exh. "P31B". He agreed that the sum of RM70,380,272.95 was the amount which Fulcrum claimed to be outstanding as at 19 November 1997. He agreed that the sums of RM625,000, RM488,640.16 and RM1.5 million when combined would come up to RM75,833,152.16 and that these figures can be seen in exh. "P31B". He also agreed that the sums of RM1,047,120.79 and RM6.5 million when combined would give the total of RM70,380,272.95 and that these figures can readily be seen in exh. "P31A". He

reiterated that the sum of RM71,838,012.31 as seen at p. 15 of the statement of claim in bundle "C" was the sum claimed by the plaintiff and that this amount can be seen at p. 214 of bundle "A" at exh. "P32". In regard to exh. "P31B", he said that when Rahaz Sdn Bhd made the request to extend the loan for six months, Fulcrum had to make available these funds and as such a commitment fee in the sum of RM625,000 was payable. He ventured to say that the extension fee was similar to the commitment fee and that Fulcrum was entitled to claim for the sum of RM625,000 and that this sum can be seen in exh. "P67". It was put and he disagreed that Fulcrum and Rahaz Sdn Bhd had agreed to roll over the balance sum of the loan and balance interest to 9 April 1998 and that no legal action would be taken against Rahaz Sdn Bhd upon the latter paying Fulcrum the total sum of RM6.5 million. He agreed that in exh. "P67" the extension fee of RM625,000 had been included and taken into account. He further said that when Rahaz Sdn Bhd made a request for an extension under s. 4.06 and s. 7.02 of the facility agreement, Fulcrum had the sole and absolute discretion to grant an extension and it was subject to the availability of funds. He said that the amount that was requested was not a small sum. He said that Fulcrum had to borrow these funds in order to lend to the borrower. He said that work was done to evaluate the credit of the request and to make the necessary arrangements with Fulcrum's financiers as those financiers were expected to be paid. He said that such expenses were incurred and as such Fulcrum had every right to impose the extension fee. He agreed that Fulcrum was fully entitled to the sum of RM625,000. To a question that the facility agreement did not contain any stipulation as to a loan extension fee or a commitment fee being payable for any loan extension, he had this to say. He said that it was Fulcrum's sole and absolute discretion to grant an extension. He said that Fulcrum had every right to impose any fee. He explained that the fees that were requested appeared in exh. "P22" as seen at p. 125 of bundle "A" under (ii) although there was no specific section in the facility agreement. He agreed that there was no specific provision in the facility agreement for payment of an extension fee or a commitment fee. To a question as to how much was the interest outstanding then when he said that "payment of RM1.5 million on 22 October 1997" and "payment of RM6.5 million on 19 November 1997" were sufficient to set off the whole of the interest outstanding and even sufficient to reduce part of the principal, he replied in this way. He referred to exh. "P67" and he said that interest from 10 October 1997 to 22 October 1997 on the amount due of RM76,219,512 amounted to RM488,640.16 after taking into account the extension fee of RM625,000, the repayment on 22 October 1997 of RM1.5 million reduced the loan to RM75,833,152.16. Interest was then computed on RM75,833,152.16 at 18 % for 28 days from 23 October 1997 to 19 November 1997 and that amounted to RM1,047,120.79. With the repayment of RM6.5 million on 19 November 1997, the amount outstanding stood at RM70,380,272.95. So out of the payment of RM1.5 million and RM6.5 million a total of RM1,535,760.95 was paid towards the interest. He agreed that the sums of RM1.5 million and RM6.5 million wiped out the interest element computed from 10 October 1997 to 19 November 1997. To a question whether he agreed that notwithstanding any extension of the loan facility, Fulcrum would nevertheless still have claimed the sum of RM13,719,512 in any event, and his reply was that the said sum was an upfront interest that was deducted. He further said that that portion of the loan and together

with the rest was due and owing as at 10 October 1997. The payment was used towards reducing the entire loan. He went direct to the point when he agreed that notwithstanding any extension to the loan facility, Fulcrum would in any event still claimed the sum of RM13,719,512 and he added further that that sum was the interest portion of the loan of RM13,719,512 which had not been paid. He agreed that exhs. "P32", "P33" and "P34" were sent on the instructions of Fulcrum. He agreed and he said that his position was that there was no extension of the loan facility. He agreed as to the contents of the letter in exh. "P34" at para. 5 thereof.

KC Loh was then re-examined, and his testimony went like this. He was shown exh. "P22" and he was asked whether by this letter Fulcrum unconditionally agreed to extend the loan facility for six months or were any conditions required to be fulfilled by Rahaz Sdn Bhd before such an extension can be given? By way of an answer he said that Fulcrum was only willing to consider extending the facility on fulfilment of the terms and conditions as set out in exh. "P22". He said that the conditions that Rahaz Sdn Bhd were required to fulfil prior to the extension being granted were that Rahaz Sdn Bhd must pay RM13,719,512 and an extension fee of RM62,500 before Fulcrum could consider extending the loan. That the letter in exh. "P22" sets out a dateline for these two conditions to be met by Rahaz Sdn Bhd and that dateline was this. That Rahaz Sdn Bhd was given seven days from the date of the letter in exh. "P22" to make the payment. He said that Rahaz Sdn Bhd did not pay the total sum of RM14,344,512 within the seven days. He said that the total loan facility that Fulcrum had granted to Rahaz Sdn Bhd on 9 October 1996 was RM76,219,512 million and that there were two tranches to this loan. One was for RM62,500,000 while the other was for RM13,719,512. He explained that the first tranche of RM62,500,000 was to finance the balance of the purchase price of the sale and purchase agreement while the second tranche of RM13,719,512 was for upfront interest calculated at 18% per annum. He said that the loan facility was due and payable at the close of business on 9 October 1997. But unfortunately, as at 9 October 1997, Rahaz Sdn Bhd had not paid any moneys to Fulcrum towards reduction of the loan facility. He said that in asking for the extension fee of RM625,000 as a condition precedent to agreeing to grant an extension he had referred to s. 4.06 of the facility agreement which was worded in this way:

> Section 4.06 **Tenure of the Facility**
>
> The tenure of the Facility is for a period not exceeding twelve (12) months from the date of first drawdown of the Facility and the Lender may, at its sole and absolute discretion and subject to the availability of funds, grant such extension as the Lender deems necessary to the whole or part of the Facility.

He too referred to s. 7.02 of the facility agreement which was worded as follows:

> Section 7.02 **Repayment of Facility**
>
> Without prejudice to Section 7.01 hereof, the Borrower hereby covenants and agrees that the Facility shall be repaid in one lump sum within twelve (12) months from the date of first drawdown of the Facility or such extended date as the Lender shall in its absolute discretion grant.

He laid emphasis on these two sections of the facility agreement. To a question whether Rahaz Sdn Bhd disputed or challenged Fulcrum's rights to impose these

conditions as a condition precedent to the granting of extension of time, he replied in the negative. He added that from the tenure of Dato' Samsudin's letter in exh. "P23" as seen at p. 127 of bundle "A" and that of Rahaz Sdn Bhd's letter in exh. "P24" as seen at p. 128 of bundle "A", no challenges were advanced in regard to the rights of Fulcrum to impose these conditions. He said that the statements of accounts in exhs. "P30" (p. 120 of bundle "A"), "P31A" (p. 121 of bundle "A") and "P31B" (p. 122 of bundle "A") were sent to Rahaz Sdn Bhd dated 31 October 1997, 30 November 1997 and 31 December 1997 respectively and that these statements of accounts included the extension fee of RM625,000. He stated that neither Rahaz Sdn Bhd nor Dato' Samsudin ever disputed any of these statements in respect of the extension fee of RM625,000 or in respect of any of the figures contained in these statements. He too explained that the interest payable by Rahaz Sdn Bhd to Fulcrum for the period 9 October 1996 to 9 October 1997 was RM13,719,512 and he added that this amount was deducted upfront and paid by the second tranche of the facility. He explained that the figure of RM13,719,512 that appeared in exh. "P22" at p. 125 of bundle "A" represented the second tranche of the facility. He was asked whether Fulcrum made a mistake and was it asking for a repayment of outstanding interest in para. 2 of exh. "P22" or was it asking for a double payment of RM13,719,512 and he replied:

> No, Fulcrum was asking for the payment of the second tranche of the facility.

He said that the sum of RM625,000 appearing at exh. "P22" represented 1% of the second tranche of the facility and of which Fulcrum was willing to consider extending. He explained that by letter as per exh. "P24", Rahaz Sdn Bhd undertook to pay back the second tranche and the extension fee of RM14,344,512 by the end of October 1997. But he said that Rahaz Sdn Bhd did not fulfil its undertaking and did not pay the full sum by the end of October 1997. He confirmed that in exh. "D38" Fulcrum gave Rahaz Sdn Bhd a final date for the latter to fulfil the conditions until 31 October 1997 and a final deadline by 15 November 1997 was given. However, he said that Rahaz Sdn Bhd failed to meet the final dateline as set out in exh. "D38". He confirmed the contents of the letter in exh. "P34" to be correct. He stated that the conditions as set out by Fulcrum in its letter in exh. "P22" were never fulfilled by Rahaz Sdn Bhd. He confirmed that Fulcrum instructed its solicitors to send a letter of demand for the outstanding sum as per exh. "P34" and in that letter too Rahaz Sdn Bhd was informed that they had defaulted in not fulfilling the conditions of the facility agreement. He elaborated and he said that no where in exh. "P34" which showed that Fulcrum had agreed to extend the loan facility to Rahaz Sdn Bhd by six months.

After making several oral applications to make the necessary amendments as alluded to in the notes of evidence and as agreed by the defendants' counsel, Mr. M. Pathmanathan submitted that with the evidence of KC Loh the case for the plaintiffs in respect of the preliminary issue had completed.

I have taken an arduous route to write this judgment notwithstanding the simple preliminary issue that has to be decided. Parties were at pains to be thorough and to leave no stones unturned. The testimonies of Lum Sing Fai, Francis Yong, Ng Eng Kiat, Dato' Jimmy Lim and KC Loh were all in tandem and they showed categorically that there was no binding agreement reached between the parties to

roll over the loan given by the plaintiffs in these two civil suits – the Samsudin Action and the Rahaz Action, for a further period of six (6) months expiring on 9 April 1998. Thus far, the evidence was indeed overwhelming and it pointed to that direction. However, I must place a caveat that I have yet to consider the evidence of Azahari and I will do so in due course. In the meantime, I must say that the evidence of the plaintiffs' witnesses bore the mark of corroboration. Each witness corroborates one another to the minutest detail. Section 134 of the Evidence Act 1950 enacts as follows:

> No particular number of witnesses shall in any case be required for the proof of any fact.

Sinha J in *Vadivelu Thevar v. State of Madras* AIR [1957] SC 614, 618-619 aptly said:

> On a consideration of the relevant authorities and the provision of the Evidence Act, the following propositions may be safely stated as firmly established:
>
> (1) As a general rule, a court can and may act on the testimony of a single witness though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of indifferent character.
>
> (2) Unless corroboration is insisted upon by statute, courts should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence, that corroboration should be insisted upon, for example in the cases of a child witness, or of a witness whose evidence is that of an accomplice or of an analogous character.
>
> (3) Whether corroboration of the testimony of a single witness is or is not necessary, must depend upon facts and circumstances of each case and no general rule can be laid down in a matter like this and much depends upon the judicial decision of the Judge before whom the case comes.

Of course, in cases where the evidence of a witness requires to be corroborated more than one witness may be required to take the stand and testify and examples of this situation can be seen in ss. 114 (b), 133 and 133A of the Evidence Act 1950; but for this exercise these sections have no relevance.

Before Azahari took the stand, Mr. Edmond Bon for both the defendants, in the Samsudin Action and the Rahaz Action, made a short address to the court and this was what he said:

> The defence case would be as follows:
>
> There was a facility agreement made on 9 October 1996 between Rahaz Sdn Bhd and Fulcrum Capital Sdn Bhd for a term loan facility of RM76,219,512.00. Pursuant to the said facility the tenure of the said facility was for a period of 12 months from the date of the first drawdown of the facility. The first drawdown on 10 October 1996 and therefore pursuant to the facility agreement the loan was to be repaid on 9 October 1997. This is a trial of a preliminary issue, namely:
>
> > Whether there was a binding agreement reached between the parties to roll over the loan given by the plaintiff for a further period of 6 months expiring on 9 April 1998?
>
> Evidence which the defence will be adducing will go to answer this preliminary issue in the positive, namely, that there was indeed a binding agreement reached between the parties to roll over the loan given by the plaintiff for a further period of 6 months

expiring on 9 April 1998. This is the only issue which the defence will show at this trial because this is the only issue which is the subject matter of this trial before YA.

With your indulgence, I propose to call at the moment 2 witnesses and I may have one more witness but I cannot for sure confirm it by today.

With that opening address, Azahari (DW 1) then took the stand. In his examination-in-chief, Azahari testified to the following. That this was the first time he gave evidence in a court of law. That he was connected to Rahaz Sdn Bhd in that he was appointed a director of Rahaz Sdn Bhd in 1993 and that he still held that position. He further said that he was employed by Khidmas Sdn Bhd as a financial manager and as the company's secretary. He too said that in connection with Khidmas Sdn Bhd he was acting as the personal assistant to Dato' Samsudin. He said that he was the personal assistant to Dato' Samsudin from 1 July 1992 until he retired in April 2000. Notwithstanding that he still said that he had connections with Khidmas Sdn Bhd in that he doubled up as the director and the company secretary. As the personal assistant of Dato' Samsudin, he said that he basically attended to his personal matters and all his appointments. He explained that Khidmas Sdn Bhd is an investment holding company and that its address is at the 3rd Floor, Wisma Socfin, Damansara Heights. He explained that Merbok Hilir Berhad manufactures medium density fibre board and he said that he had no connection with that company. He explained that Dato' Samsudin is the chairman and director of Merbok Hilir Berhad. He said that Merbok Hilir Berhad is located in Merbok Kedah. In regard to exh. "P3" as seen at p. 4 of bundle "A", he had this to say: that it was an offer letter from Fulcrum to Rahaz Sdn Bhd and it was dated 27 September 1996. According to him the letter in exh. "P3" was for the attention of Dato' Samsudin, Encik A. Aziz Ismail and himself. He explained that exh. "P3" was an offer letter of the term loan facility for RM76,219,512 and the borrower was Rahaz Sdn Bhd. Under the loan facility he explained that Rahaz Sdn Bhd borrowed RM76,219,512. He explained that the purpose of the borrowing was to finance up to RM62.5 million on the balance of the purchase in a sale and purchase agreement signed on 21 May 1996 between Bafana Holding Limited and Landmarks Hotel and Realty Sdn Bhd. He was asked that RM62.5 million was needed and yet the facility limit was RM76,219,512 and he explained that the difference between the facility limit of RM76,219,512 and the RM62.5 million was the interest portion of the loan. When asked whether the interest amounted to RM13,719,512, he replied in the affirmative. He said that the rate of the interest was at 18% per annum. He explained that the tenure of the facility was for 12 months from the date of the first drawdown of the facility. He was asked whether the tenure could be extended and he replied in the affirmative. He said that cl. 4 of the offer letter allowed the tenure to be extended. He agreed and confirmed that by cl. 4 of the offer letter in exh. "P3", "Any request for extension of tenure will be granted at the sole and absolute discretion of FCSB." He explained that the initials "FCSB" refer to Fulcrum Capital Sdn Bhd. He said that there were no other express conditions for granting an extension of the tenure. He too said that there was no provision for an extension fee to be paid. He also said that there was no provision for a commitment fee to be paid. He said that the repayment of the facility shall be by way of a lump sum payment of the loan sum and that the repayment shall be made at the expiry of the loan period. He said that when he talked about the loan sum he was referring to

the term loan facility of RM76,219,512. He said that Rahaz Sdn Bhd was allowed to use RM62.5 million and that the sum of RM13,719,512 was the interest. He said that the sum of RM13,719,512 had been paid upfront. He said that the drawdown was to be effected upon receipt of written notice of at least three working days inclusive of the day of notice from the borrower subject to the terms and conditions of the letter of offer. When asked for how long the offer was available, he replied that the facility was available for a period of 30 days from the date of extension of the letter of offer. He said that the letter of offer as per exh. "P3" was accepted and this, according to him, can be seen at p. 11 of bundle "A" of exh. "P3" where his signature appeared next to his name. He said that the signatories for Fulcrum in the letter of offer was the director by the name of Soo Kim Wai and the company secretary by the name of Yip Chan Sing. He said that he knew Soo Kim Wai and that he had met him once before. He explained that he had met Soo Kim Wai during the signing of the facility agreement and that was sometime in late September or early October 1996. He said that Rahaz Sdn Bhd took the loan facility on a secured basis and these securities can be seen at cl. 7 of the offer letter at exh. "P3" as seen at p. 5 of bundle "A". He said that according to cl. 7(iv) of the offer letter there was a pledge of the entire paid up capital of Rahaz Sdn Bhd together with the duly executed blank transfer form(s) in favour of Fulcrum or its nominee(s). He too said that he pledged his two shares in Rahaz Sdn Bhd under cl. 7(iv) of the offer letter. He said that Rahaz Sdn Bhd by virtue of cl. 7(i) of the offer letter made a first party pledge of 22,500.000 shares of Merbok Hilir Sdn Bhd together with the duly executed blank transfer form(s) in favour of Fulcrum and or its nominee(s). He said that Dato' Samsudin also provided his shares of 49,998 in Rahaz Sdn Bhd as security. He said that Dato' Samsudin was not a shareholder of Merbok Hilir Berhad. He said that there was a condition precedent to the facility as seen at p. 6 of bundle "A" at para. (b)(i)(aa) and (bb) of exh. "P3" and he further said that the condition precedent had been satisfied. Now, para. 9.1(b)(i)(aa) and (bb) of exh. "P3" at p. 6 of bundle "A" are worded in this way:

> b. the Borrower shall deliver or cause to be delivered to FCSB:
>
> (i) a resolution by the Board of Directors of the Borrower authorising the acceptance of the Facility on the terms and conditions of this Letter of Offer and specific officer(s) of the Borrower to:
>
> (aa) maintain and operate this Facility with FCSB; and
>
> (bb) endorse, on behalf of the Board of Directors, a copy of this Letter of Offer as evidence of acceptance of the terms and conditions of this Facility.

and according to Azahari he had endorsed on the letter of offer by affixing his signature as seen at p. 11 of bundle "A". He identified exh. "P4" as seen at p. 12 of bundle "A" and he said that it was a board resolution of Rahaz Sdn Bhd. Exhibit "P4" too designated a named officer as that of Dato' Samsudin as seen at p. 13 of bundle "A" and he too identified the said Dato's signature there. He too identified his own signature that appeared at p. 13 of bundle "A" as per exh. "P4". Apart from that the signature of A. Aziz bin Ismail also appeared at p. 13 of bundle "A" as per exh. "P4". He said that there were no other directors of Rahaz Sdn Bhd apart from the personalities that appeared at p. 13 of bundle "A" as per exh. "P4", namely, himself and A. Aziz bin Ismail. He said that para. 9.1 (c) (ii) and (iii) of exh. "P3" at p. 6 of bundle "A" were the conditions inserted and these were:

c. the Borrower shall deliver to FCSB:

(ii) original or certified true copy of the sale and purchase agreement signed between LHR (Landmarks Hotel & Realty Sdn Bhd) and Bafana (Bafana Holding Limited) dated May 21, 1996.

(iii) a written confirmation from the LHR's solicitor that the difference between the purchase price and the principal amount of the facility has been paid by Bafana.

and that these conditions were inserted because the loan was taken to finance the balance of the purchase price of the sale and purchase agreement signed between Landmarks Hotel and Realty Sdn Bhd and Bafana Holding Limited. He explained that these conditions precedent were satisfied. He said that the acceptance of the facility was given on 30 September 1996 and the resolution as per exh. "P4" was also made on the same day. He was shown the facility agreement in exh. "P5" and he identified his signature on the top right hand of p. 47 of bundle "A". To the left of his signature was the signature of A. Aziz Ismail.

Mr. M Pathmanathan, at this juncture, stood up and pointed out that the plaintiffs had accepted exh. "P5" and all the other documents in bundle "A" were not disputed. He pointed out that the defendants should not cover grounds which have been accepted by the parties. He pointed out that Mr. Edmund Bon in his opening speech had succinctly put the issue before the court in that the case for the defendants were that there was a facility agreement between Rahaz Sdn Bhd and Fulcrum. He pointed out that Mr. Edmund Bon too had said that the term loan was RM76,219,512 and that the tenure was 12 months from the date of the first drawdown ie, on 10 October 1996 and that the loan was to be repaid on 9 October 1997. All these, according to Mr. M. Pathmanathan, were admitted by the plaintiffs. The only issue was whether there was a binding agreement reached to roll over the loan for six months until 9 April 1998. Mr. M. Pathmanathan complained that the whole line of questioning for the last hour covered common admitted grounds.

Mr. TS Lim for the defendants disputed what had been said by Mr. M. Pathmanathan. Mr. TS Lim submitted that the proceedings revealed very serious disagreements as to the contents of the documents and he pointed out that Mr. M Pathmanathan too had extensively touched on the documents and the interpretation of those documents from the witnesses' perspectives.

I simply took note of their objections. Azahari then continued with his examination-in-chief.

He said that Dato' Samsudin had an indirect interest in Merbok Hilir Berhad. He confirmed that the facility agreement in exh. "P5" was between Rahaz Sdn Bhd and Fulcrum and that it was not actually signed on 9 October 1996. He believed that exh. "P5" was signed on a much earlier date. He said that the facility agreement in exh. "P5" was signed on the day of the signing ceremony and it was later sent for stamping. He explained that as far as he could recall, the people who attended the signing ceremony were from both sides. From Rahaz Sdn Bhd, the personalities that attended were Dato' Samsudin, Aziz Ismail and himself; while from Fulcrum, he said that Francis Yong was there and he thought that Dato Jimmy Lim was there together with Lum Sing Fai.

Again, at this juncture, Mr. M Pathmanathan questioned the relevance of these questionings and he referred to the opening speech of Mr. Edmund Bon who had said that the only issue was in regard to whether there was a roll over for six months. He pointed out that who was present at the signing ceremony and whether exh. "P5" was signed on the date other than the date appearing in the agreement were wholly irrelevant. He pointed out that the defendants have defined their case in their opening speech and having put themselves in a straight jacket they must not be allowed to stray. He then sought this court's direction that the defence be confined within the parameters of their opening speech.

In rebuttal, Mr. TS Lim merely submitted that Mr. M Pathmanathan had questioned the relevance of the defendants' questioning and he added that the relevance of it all can be seen later.

I immediately ruled that the defendants to confine itselves within the parameters of the opening speech of Mr. Edmund Bon.

With that brief discourse, the examination-in-chief of Azahari proceeded full steam ahead.

Azahari testified that from the total limit of the facility of RM76,219,512 the amount that was available to Rahaz Sdn Bhd to use was RM62.5 million. The balance amounting to RM13,719,512 was in the form of an interest. He said that according to s. 6.01 of the facility agreement in exh. "P5", the rate of interest was at 18% per annum. He said that he had calculated and that the total interest of 18% per annum should amount to about RM11 million. He identified the sample of the drawdown notice at p. 48 of bundle "A". He identified exh. "P17" at p. 49 of bundle "A" as the drawdown notice typed on Rahaz Sdn Bhd's letter head. He was asked as to how the drawdown notice in exh. "P17" was issued and he said that a sample of the drawdown notice was faxed to Rahaz Sdn Bhd by Fulcrum's solicitors and that Rahaz Sdn Bhd was instructed to type the contents of the drawdown notice on Rahaz Sdn Bhd's letter head and to leave the date blank. He explained that the amount on the first paragraph was left blank, the amount of item 1 was left blank, the amount of item 2 was left blank and he further said that Rahaz Sdn Bhd was asked to have the letter for the notice to be signed by both the directors of Rahaz Sdn Bhd. He explained that the procedure for the drawdown was that upon the fulfilment of all the conditions precedent, Rahaz Sdn Bhd was to deliver the drawdown notice to effect the drawdown. He said that the conditions precedent were satisfied. To his knowledge Rahaz Sdn Bhd was to use RM62.5 million under the facility. He said that he had not seen a copy of the complete drawdown notice. He said that on receipt of the sample of the drawdown notice from Fulcrum, Rahaz Sdn Bhd did as instructed by preparing it on Rahaz Sdn Bhd's letter head and left the dates, the amount blank, signed by both the directors and delivered the notice to Fulcrum's solicitors. He denied that he was given a copy of the drawdown notice duly finalised. He said that the first time that the completed drawdown notice was received by Rahaz Sdn Bhd and seen by him was when the suit against Dato' Samsudin started.

At this juncture, Mr. M Pathmanathan addressed this court. He submitted that this court had already made the order that the defence be confined within the parameters of the defence. He pointed out that he had waited for the last 15 minutes and he

had failed to see the relevance of the drawdown notice and whether the interest of RM13,719,512 which in the opinion of this witness – referring to Azahari, should be RM11 million was wholly irrelevant.

Mr. TS Lim responded and he submitted that if the preliminary issue was answered in the positive, the net result would be that the plaintiffs would have all the evidence by which the plaintiffs purported to state that it was entitled to the full sum claimed in the statement of claim admitted as evidence. But the defendants would not have any evidence in rebuttal. He further submitted that if the preliminary issue was answered in the positive, it would mean that there was an extension and the trial of the preliminary issue will conclude in favour of the defendants. He submitted further that if the preliminary issue was answered in the negative then he believed that the plaintiffs would seek judgment on the entire sum claimed to the tune of RM71,838,012.31 with interest on RM70,380,272.95 at 18% per annum on daily basis from 1 January 1998 till the date of full settlement. He further submitted that the plaintiffs have also claimed at p. 81 and p. 82 – referring to the statement of claim in bundle "C", the equivalent sum which came up to RM79,196,125.22 and interest on RM70,380,272.95 at 18% per annum on daily basis from 1 August 1998 until the date of full settlement. He also submitted that the plaintiffs have led extensive evidence to show why they were entitled to all these sums and the plaintiffs too have shown what payments and realisation of securities were to be taken into account from their perspectives. He then submitted that if the defendants were to be shackled by the opening speech and not be allowed to adduce evidence, a definitive ruling would certainly be helpful.

Mr. M Pathmanathan then responded. He submitted that if the preliminary issue was answered in the negative, the entire defence will fail and the counterclaim too should be dismissed with costs and that judgment should be entered on the outstanding sum in accordance to the statement of account dated 1 October 2000 ("P67") against both Rahaz Sdn Bhd and Dato' Samsudin. This, according to him, was in fact agreed to way back on 25 August 2000 at the time when the defendants were represented by their former solicitors Messrs Atma Singh Veriah & Co., and that this was also borne out in the written judgment of this court. He then submitted that even today Mr. TS Lim agreed that if the preliminary issue was answered in the negative, the plaintiffs were entitled to judgment. He then submitted that only if the preliminary issue was answered in the positive would the issue of damages due, if any, would be relevant to the evidence. He reiterated that it was by consent that the parties agreed to the preliminary issue and that the defence and the counterclaim will fail completely if the answer was in the negative. Furthermore, he submitted that by their opening speech which this court had ruled upon, the defendants should confine the evidence to the singular issue of whether there was an extension until 9 April 1998. He concluded his submission by asking this court to make the necessary direction.

Mr. TS Lim replied and he submitted that it was the plaintiffs who had raised the issue of quantum when it adduced the documents in bundle "D" as well as some documents in bundle "B". He submitted that the trial had proceeded and the plaintiffs have adduced those evidence. He said that the submission that the defendants cannot rebut that evidence just because in our opening speech we had set out our case in summary was a principle unknown to law.

I then made a ruling. I ruled that my previous ruling that the evidence to be led must be confined within the opening speech of Mr. Edmund Bon remained intact.

The examination-in-chief of Azahari then continued. He confirmed that exhibits "P19A" to "P19L" were in relation to the statements of accounts of the loan facility. He said that when he received these monthly statements of accounts and after looking at the amount due which was RM76,219,512 he just had them filed. He too said that he would show it to Dato' Samsudin. He added that each and every statement of account upon its receipt he would show it to Dato' Samsudin. In relation to p. 116 to p. 119 of bundle "A" – referring to exhs. "P19I" to "P19K", he admitted that these statements of accounts showed that the total interest of RM76,219,512 had been deducted upfront. He however said that the same was not true for the statements of accounts as seen at p. 108 to p. 115 of bundle "A" – referring to exhs. "P19A" to "P19H". In relation to exh. "P30" as seen at p. 120 of bundle "A", he said that the note appearing at the bottom thereto stated that the loan was overdue on 9 October 1997 and the late interest at 18% per annum shall be calculated on daily basis. He identified a letter marked as exh. "P20" as seen at p. 123 of bundle "A" as a letter written by him which letter was from Rahaz Sdn Bhd to Fulcrum requesting for a roll over of the loan facility for a further six months period. He said that exh. "P20" was for the attention of Francis Yong and that he had occasion to speak to him in regard to the facility. He admitted that the resolution in exh. "P4" stated that Dato' Samsudin shall maintain and operate the facility. He said that Dato' Samsudin was not often in Malaysia and that most of the time he would be in South Africa. He stated that during the absence of Dato' Samsudin, he would deal with Fulcrum in regard to the facility. According to him Dato' Samsudin will direct him to discuss matters of the loan on his behalf and revert to him the result of the discussion. He said that prior to the issuance of the letter in exh. "P20" as seen at p. 123 of bundle "A", he used to meet Dato' Samsudin about three to four times. He said that he did not meet any other officer of Fulcrum but nevertheless he said that when he met Francis Yong he would be discussing on matters pertaining to the loan facility. In regard to the documents at p. 133 to p. 168 of bundle "A", he said that he was not familiar with these documents. He too said that these documents were never ever given to him.

In regard to p. 141 of bundle "A", Azahari said that it had not been made known to him that Francis Yong cannot sign letters of offer and or undertakings or any other letter that may bind Fulcrum into any commitment. He said that he was made known that Francis Yong was not allowed to sign any letter singly. He confirmed that he had acted as a representative of Rahaz Sdn Bhd in dealing with Fulcrum. He said that the representative of Fulcrum that he most frequently dealt with on behalf of Fulcrum was Francis Yong. He said that neither Fulcrum nor Francis Yong ever told him that Francis Yong's authority was limited. In regard to the question of whether Francis Yong ever informed him that he had no authority to extend the loan facility, this was his reply:

> Normally he – referring to Francis Yong, will say that he will go back to his office to check with his boss.

He said that Francis Yong did not tell him that he – referring to Francis Yong, had no authority to convey Fulcrum's decision on extending the loan facility. In regard to exh. "P21" of p. 124 of bundle "A", he said that this was a letter from Fulcrum to Rahaz Sdn Bhd where it stated that Fulcrum had received partial approval to the loan for a further period of six months from their Board of Directors pending the final approval from Tan Sri Dato' Azman Hashim. He said that Rahaz Sdn Bhd was required to pay a sum of money prior to the roll over and it consisted of the interest outstanding up to 9 October 1997 amounting to RM13,719,512 and also a roll over fee of 1% flat on the principal amount which was RM625,000. He said that these sums were paid on or before 9 October 1997, and he further said that these sums were not paid by Rahaz Sdn Bhd. He was then asked:

> Why was this deadline not met?

and he answered:

> Because Dato' Samsudin informed me that he will write to Fulcrum to defer the payment of interest to end of October 1997.

This provoked a response by Mr. M. Pathmanathan and he rightly pointed out that:

> This is hearsay evidence, unless the defence confirmed that Dato' Samsudin will be called as a witness.

Mr. T.S. Lim then replied and he said on behalf of the defendants that:

> We are trying to get Dato' Samsudin.

Mr. M. Pathmanathan retorted:

> There must be an undertaking to call Dato' Samsudin otherwise the question will be withdrawn.

Mr. T.S. Lim replied:

> I believe it is not proper and I cannot give such an undertaking. If Dato' Samsudin is not called then the answer will collapse.

Mr. M. Pathmanathan responded:

> I disagree strongly.
>
> The procedure is that evidence that is hearsay should not be admitted unless the person who made the statement is being called. The defence had objected to the hearing of this preliminary issue stating that the dates between 20.11.2000 to 24.11.2000 and 27.11.2000 to 30.11.2000 would be suitable and on these dates Dato' Samsudin would be available.
>
> I don't think the court should record the notes of evidence containing hearsay evidence. The defendants' should commit themselves. The defendants should not treat the trial as a frivolity, then it defeats the purpose of the trial. The defendants should not be shifty; either Dato' Samsudin is coming or he is not coming.

Mr. T.S. Lim replied:

> We are going to call him. But I cannot confirm when Dato' Samsudin is going to be called.

In reply this was what Mr. M. Pathmanathan said:

> It is hearsay. It infringes the rule against hearsay.

I then made the ruling and I said:

> The hearsay evidence which this witness alluded to that Dato' Samsudin had informed him that he (Dato' Samsudin) would write to Fulcrum to defer payment of interest to the end of October 1997 is disallowed.

It is opportune, at this juncture, to say something about the rule against hearsay. Section 60 of the Evidence Act 1950 enacts as follows:

> Oral evidence must be direct
>
> (1) Oral evidence shall in all cases whatever be direct, that is to say:
>
> (a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;
>
> (b) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;
>
> (c) if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;
>
> (d) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.
>
> (2) The opinions of experts expressed in any treatise commonly offered for sale and the grounds on which such opinions are held may be proved by the production of the treatise if the author is dead or cannot be found or has become incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable.
>
> (3) If oral evidence refers to the existence or condition of any material thing [including] a document, the court may, if it thinks fit, require the production of that material thing [or other document] for its inspection.
>
> NOTES
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> The word in the first set of square brackets in sub-s (3) was amended by the Evidence (Amendment) Act 1993 (Act A851) s. 5. Previously, it read 'other than'. The words in the second set of square brackets were inserted by the same Act.

and this is the section that is often referred to when one deals with the rule against hearsay. Murray – Aynsley CJ in *Lim Ah Oh and Anor v. R* [1950] MLJ 269, 270 aptly said:

> The rule against hearsay is found in section 60 of the Evidence Ordinance. On this matter I think that the rule is the same as in England and that under that section evidence of statements might be admitted provided always that the reason of admitting was borne in mind, and carefully explained to the jury, if there was one.

Lord Wilberforce in *Ratten v. The Queen* [1972] AC 378 succinctly said at p. 387 of the report:

> A question of hearsay only arises when the words spoken are relied on testimonially, i.e. as establishing some facts narrated by the words.

The reason for excluding hearsay evidence can also be seen in the speech of Seah FJ in *Leong Hong Khie v. Public Prosecutor* and *Tan Gong Wai v. Public Prosecutor* [1986] 2 MLJ 206, 208 where his Lordship said:

> The general rule is that hearsay evidence is not admissible as proof of a fact which has been stated by a third person. This rule has been long established as a fundamental principle of the law of evidence. To quote Lord Normand in *Teper v. R* [1952] AC 480, 486:
>
> > The rule against the admission of hearsay evidence is fundamental. It is not the best evidence, and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken by another witness cannot be tested by cross-examination and the light which his demeanour would throw on his testimony is lost.
>
> In our opinion, another reason is the danger that hearsay evidence may be concocted, fabricated and tailored to suit the witness's testimony.

It is a correct legal assertion to make that all statements or declarations, be it oral or written, of persons not called as witnesses but repeated by third persons are excluded as hearsay. At common law, the rule against hearsay is one of the oldest and the most interesting. So interesting it is that it has provoked Lord Reid to comment in *Myers v. DPP* [1965] AC 1001 at 1019, [1964] 2 All ER 881 at 884 that it was "difficult to make any general statement about the law of hearsay which is entirely accurate." The House of Lords in *R v. Sharp* [1988] 1 All ER 65 at 68, [1988] 1 WLR 7 at 11 formulated the rule against hearsay in this way, "an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted." Perhaps the most authoritative judicial definition of the rule against hearsay may be found in the case of *Subramaniam v. Public Prosecutor* [1956] 1 WLR 965 at 969 where the Judicial Committee of the Privy Council said:

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is inadmissible when it is proposed to establish by evidence, not the truth of the statement, but the fact that it was made.

and it was this salient advice that was overlooked by the trial judge in that case. In *Subramaniam v. Public Prosecutor (supra),* the appellant was charged with being in possession of firearms without a lawful excuse and his defence was that he was acting under duress in consequences of threats uttered by the terrorists. The trial judge would not allow the accused to state what had been said by the terrorists and the Judicial Committee of the Privy Council advised that the conviction should be quashed because the reported assertions were tendered as original evidence and ought to have been received as such. Of course, factually speaking, the facts in *Subramaniam v. Public Prosecutor (supra)* are poles apart from the facts of the present case. There the accused was unable to call the terrorists to the stand to give evidence for him. Here, there was no such impediment. Dato' Samsudin was cited as a party by name in the Samsudin Action and he chose not to attend court nor give evidence yet it was sought to admit the evidence through Azahari that Dato' Samsudin had informed Azahari that he – referring to Dato' Samsudin, would write

to Fulcrum to defer payment of interest to the end of October 1997. This piece of evidence was certainly hearsay and inadmissible when the object of the evidence was to establish the truth of what was contained in the statement. It is germane to note that the approach of the Judicial Committee of the Privy Council in *Subramaniam v. Public Prosecutor (supra)* was adopted and explicitly approved by the Supreme Court of Canada in *R v. Abbey* [1982] 138 DLR (3d) 202. For the record, the trial judge in *R v. Willis* [1960] 1 All ER 331, [1960] 1 WLR 55 also overlooked the salient advice of the Judicial Committee of the Privy Council in *Subramaniam v. Public Prosecutor (supra).* The same oversight was also made by a magistrate and this can be seen in the case of *Woodhouse v. Hall* [1980] 72 Cr. App Rep 39. It is ideal to point out that the rule against hearsay applies equally to evidence elicited in cross-examination as well as to evidence-in-chief. Thus, a deceased workman's statements to his widow on returning home after an accident have been held inadmissible (*Gilbey v. Great Western Railway Co.* [1910] 102 LT 202; and *Amys v. Barton* [1912] 1 KB 40). In *Beare v. Garrod* [1915] 113 LT 673, a widow narrated in cross-examination what her deceased husband had told her about the cause of his injuries or illness, and the court refused to accept her assertions. In *R v. Summers* [1986] 22 ACR 47, the court allowed an appeal on account of cross-examination that was permitted to elicit hearsay evidence.

So much on the law of hearsay. I will now revert to the testimony of Azahari. He testified that exhs. "P19A" at p. 108 of bundle "A" together with exhs. "P19B" (p. 109 of bundle "A"), "P19C' (p. 110 of bundle "A"), "P19D" (p. 111 of bundle "A"), "P19E" (p. 112 of bundle "A"), "P19F" (p. 113 of bundle "A"), "P19G" (p. 114 of bundle "A"), "P19H" (p. 115 of bundle "A"), "P19I" (p. 116 of bundle "A"), "P19J" (p. 117 of bundle "A"), "P19K" (p. 118 of bundle "A"), and "P19L" (p. 119 of bundle "A") showed the amounts that were due on 9 October 1997 to be RM76,219,512. He stated that by comparison, the statement of accounts in exh. "P30" as seen at p. 120 of bundle "A" showed the extension fee of RM625,000 and the last interest of RM336,574.54. He too confirmed in regard to the figures in exh. "P31A" as seen at p. 121 of bundle "A" and exh. "31B" as reflected at p. 122 of bundle "A". It was an exasperating exercise which provoked an objection by Mr. M. Pathmanathan who pointed out that the same questions were being repeated and that Azahari had not been asked in regard to the preliminary issue. That was indeed true and this court merely took note of the objections. Proceeding further, Azahari agreed that in exh. "P22" at p. 125 of bundle "A" Fulcrum agreed to the request for the loan extension subject to the terms and conditions prior to the loan extension as set out in paras. (i) and (ii). He said that Rahaz Sdn Bhd accepted the letter in exh. "P22" but did not sign the acknowledgment because the conditions for replying this letter needed Rahaz Sdn Bhd to pay RM14,344,512. Thus far, Mr. M. Pathmanathan was not too happy with the way the trial proceeded. He stood up and objected and this was what he said:

> Dato' Samsudin is a party in the S5 suit and it is up to the lawyers to give an undertaking that Dato' Samsudin has to be called.

Mr. Edmund Bon responded in this way:

> We cannot control our client i.e. Dato' Samsudin whether he will come or otherwise. We have control – total control of the proceedings and whether Dato' Samsudin can come or not is not something within our control. He may be a party to the proceedings. We are fully aware of the legal aspects when a witness cannot or does not give evidence. However, the issue of our undertaking to be given by us personally as solicitors is, with respect, not proper. We are aware that any breach of the undertaking would certainly result in dire consequences.

I merely took note of these legal exchanges bearing in mind that an undertaking given by a solicitor who is acting professionally for a client is quite onerous in that it may be enforced by committal (*D v. A & Co* [1900] 1 Ch 484) in a summary way by way of a motion (*Re FC* [1888] WN 77 (Chancery Division)) or by summons (*United Mining and Finance Corpn Ltd v. Becher* [1910] 2 KB 296, DC). But the court must, in the first place, make a mandatory order on the solicitor to perform his undertaking (*Re A Solicitor* [1966] 3 All ER 52, [1966] 1 WLR 1604) once the solicitor has given his undertaking. However, the court cannot compel a solicitor to give a personal undertaking (*Chilton v. Blair & Co Ltd* [1914] 8 BWCC 1). Put in another way, before an undertaking may be enforced summarily it must be shown that the undertaking is given by the solicitor personally (*Burrell v. Jones* [1819] 3 B & Ald 47; *Iveson v. Conington* [1823] I B & C 160; *Watson v. Murrel* [1824] I C & P 307; *Re Bentley, ex parte Bentley* [1833] 2 Deac & Ch 578; *Hall v. Ashurst* [1833] 1 Cr & M 714; *Brandon v. Smith* [1853] 1 WR 130; and *Leedham v. Baxter* [1856] 4 WR 241) and not merely as an agent on behalf of his client (*Downman v. Williams* [1845] 7 QB 103, Ex Ch; *Re Williams* [1850] 12 Beav 510; *Lewis v. Nicholson* [1852] 18 QB 503; *Burnett v. Proois, Re An Attorney* [1870] 22 LT 543; and *Walker v. Arlett* [1831] 1 Dowl 61). That undertaking too must be given by the solicitor not in his individual capacity (*Northfield v. Orton* [1832] 1 Dowl 415; *Ex parte Watts* [1832] 1 Dowl 512; *Re Bateman* [1833] 2 Dowl 161; *Ex parte Clifton* [1836] 5 Dowl 218; *Re Samuel v. Rhodes, ex parte Samuel v. Isaacs* [1838] 2 Jur 858; *Ex parte Evans* [1840] 4 Jur 991; *Re Webb* [1845] 14 LJQB 244; *Russel v. Reece* [1847] 2 Car & Kir 669; *Re Kearns* [1847] 11 Jur 521; and *Allaway v. Duncan* [1867] 16 LT 264) but rather in his professional capacity as a solicitor (*Re Gee* [1845] 2 Dow & L. 997; *Re Fairthorne* [1846] 1 Saund & C 40; *United Mining and Finance Corpn Ltd v. Becher* [1910] 2 KB 296 at 307; *Silver and Drake v. Baines* [1971] 1 QB 396, [1971] 1 All ER 473; CA; *Re Pass* [1887] 35 WR 410; and *Re FC* [1888] WN 77). The undertaking must not be vague; it must be clear in its terms (*Thompson v. Gordon* [1846] 15 M & W 610). Even though the client dies, the undertaking will still be enforced against the solicitor (*Hellings v. Jones* [1825] 3 Bing 70). That would be the magnitude of giving an undertaking by a solicitor in his professional capacity.

The trial continued and in regard to exh. "P23" of p. 127 of bundle "A", Azahari confirmed as to its contents. He said that he was instructed by Dato' Samsudin to sign the letter dated 21 October 1997 as seen in exh. "P24" where Rahaz Sdn Bhd made the payment of RM1.5 million being part payment of the interest payable amounting to RM14,344,512. He further stated that the sum of RM14,344,512 was stated in exh. "P21" which sum was made up of the interest outstanding up to 9 October 1997 amounting to RM13,719,512 and a roll over fee of 1% flat on the principal amount which came to RM625,000. He identified the cheque for RM1.5

million as seen in exh. "P25" and he further said that Fulcrum accepted the said cheque without any protest. He said that the statement of accounts in exh. "P67" dated 31 October 2000 was not received by him but nevertheless he said that the sum of RM1.5 million was clearly stated in that statement. He also said that exh. "P67" alluded to the extension fee of RM625,000. He agreed that the sum of RM625,000 in exh. "P67" referred to the roll over fee as seen in exh. "P21". He repeated once again that exhs. "P30", "P31A" and "P31B" made reference to the extension fee of RM625,000.

So far the line of questioning was uneventful. Azahari was merely shown the exhibits in bundle "A" and he identified them and its contents easily. The style of conducting the defence and the method of questioning Azahari brought a sharp response from Mr. M. Pathmanathan and this was what he said:

> For RM625,000.00, all the statements of accounts starting from 31 October 1997 included this sum as an extension fee. We admit that. It is our case. All these documents are ours. And no need for the defence to be at pains to repeat them.

Dato' V. Sivaparanjothi for the plaintiffs joined in the affray. He rightly submitted as follows:

> With respect, we have to give some credit to this witness, a financial controller, a qualified man. To ask him question whether RM625,000.00 appears at exhibit P67 and whether it appears at page 120 of bundle 'A' and so on, is an insult to his intelligence. One can see that it is clearly legible that the said amount appears. The line of questioning is a waste of court's time and nothing so far has been established in relation to the four corners of the preliminary issue other than to lead the witness to refer to the documents and to read them. This line of questioning should be stopped so as to save everybody's time.

Mr. Edmund Bon realising his folly said:

> Strong words are employed.

I merely took note of what had transpired and I have this to say.

Although the learned counsel has a duty to discharge for the benefit of his client by fearlessly raising every issue, advance every argument and ask every question, without any regard to the unpleasant consequences that may befall himself (*Rondel v. Worsley* [1969] 1 AC 191 at 227, [1967] 3 All ER 993 at 998 HL), yet it must not be forgotten that in the interests of the administration of justice, the learned counsel has an overriding duty to the court by maintaining the standards of his profession (*Beevis v. Dawson* [1957] 1 QB 195 at 201, [1956] 3 All ER 837 at 839, CA). Thus, it would be appropriate that the learned counsel should ask relevant questions germane to the preliminary issue as framed and should not ask exasperating questions designed to unduly prolong the hearing of the case. Legal manoeuvrings designed to irritate the court in the course of questioning the witness which do not serve any useful purpose, at all, must be stopped. It would also be wrong in the extreme if the learned counsel knowingly mislead the court just like what had happened in *Meek v. Fleming* [1961] 2 QB 366 where the barrister knowingly suppressed evidence of a police witness's demotion for misconduct and the court

ordered a retrial and the barrister was subsequently disciplined. Whatever situations the learned counsel are placed in, he must put his duty to the court above all else. His duty to his client can never override his duty to the court (*Rondel v. Worsley (supra)*).

While the learned counsel has the right to choose what witnesses to call and the order of priority in which they are to be called (*Briscoe v. Briscoe* [1968] P 501, [1966] 1 All ER 465), yet his duty is to call the relevant witnesses that will assist the court in resolving the preliminary issue as framed. In questioning the witnesses, there must be some measure of courtesy and consideration (*Mechanical and General Inventions Co and Lehwess v. Austin and Austin Motor Co* [1935] AC 346 at 359, 360, HL), and questions must not be intended to insult or annoy the witnesses or some other persons including the opposing counsel. The learned counsel too must not waste the court's time and his client's money by advancing protracted and irrelevant questions.

So much for the legal discourse.

Proceeding ahead with the trial, Azahari said that it was "hard" for him to say whether the questions had insulted his intelligence. He then said that the extension fee was meant to roll over the facility for six months. He was referred to s. 6.01 of the facility agreement in exh. "P5" and he said that the interest rate as stated therein was 18% per annum and that on the basis of 18% per annum the quantum would come up to RM11 million. He said that he used to meet Francis Yong in the latter's capacity as a representative of Fulcrum. That meeting took place on the day of the signing of the facility agreement. He said that Francis Yong handled the facility account for Fulcrum. He too said that he only dealt with Francis Yong in respect of the facility account. He said that he did not deal with anyone else except Francis Yong. At this juncture, Mr. M. Pathmanathan stood up and remarked that these questions have been asked by Mr. T.S. Lim. The latter agreed and said, "yes" while nodding his head. Mr. Edmund Bon said that he would attempt to synchronise in the future. I merely noted what had transpired. The trial has been rather prolong and time consuming. James Russell Lowell in Columbus once said:

> Endurance is the crowning quality, and patience all the passion of great hearts.

and patience was certainly the order of the day. Azahari was once again shown exh. "P26" of p. 130 of bundle "A" and he said that this letter referred to a meeting between Francis Yong and Dato' Samsudin on 14 November 1997. He said that according to exh. "P22", the time period for paying the sums as alluded to in (i) and (ii) of exh. "P22" was seven days from the date of the letter. The deadline was on 17 October 1997 but by that date Rahaz Sdn Bhd did not pay the sum of RM14,344,512 and Fulcrum did not declare the facility to be in default by 17 October 1997. In regard to the payment of RM1.5 million, he said that the payment was by cheque which was sent by hand to Fulcrum. He said that Fulcrum did not claim for the balance of the sum of RM14,344,512 and neither did Fulcrum declare the loan to be in default on 1 October 1997. He was shown exh. "P30" which was a statement of account dated 31 October 1997 and he said that it showed the amount outstanding as at 31 October 1997 to be RM76,169,726.70. He said that the extension fee of RM625,000 had been paid. He said that he issued the letter in exh. "P26" which was a letter from Rahaz Sdn Bhd to Fulcrum enclosing payment of RM6.5

million after the meeting between Francis Yong and Dato' Samsudin. He explained that the words "balance of the interest" that appeared in exh. "P26" meant that the total sum due was RM13,719,512 plus RM625,000 for the extension less the sum of RM1.5 million which was paid on 21 October 1997 and also the sum of RM6.5 million which was paid on 18 November 1997. He explained the meaning to the third paragraph of exh. "P26" to be that upon payment of RM6.5 million the balance of the interest and the principal amount was to be rolled over for a further period of 6 months expiring on 9.4.98. He said that upon payment of RM6.5 million, Fulcrum had agreed that no legal action was to be taken against Rahaz Sdn Bhd.

He testified that on 14 November 1997 he was in his office at Khidmas Sdn Bhd. He explained that Khidmas Sdn Bhd shared similar premises with Rahaz Sdn Bhd. He said that on 14 November 1997 Francis Yong from Fulcrum came and met him. He said that on Friday 14 November 1997 Francis Yong came to Khidmas Sdn Bhd and this was before lunch time. He explained that when Francis Yong came, he got out of his room and met him at the reception area. He said that he "chit-chatted" with Francis Yong for a while at the reception area. He said that he just asked Francis Yong about how he was doing. More specifically he said that he did not discuss the facility. He testified that Francis Yong came to the office to meet Dato' Samsudin because they have a meeting. He said that it was he who made the appointment for Dato' Samsudin to meet Francis Yong. He said that the appointment was for Dato' Samsudin to meet Francis Yong to discuss about the roll over facility. He said that after he "chit-chatted" with Francis Yong, Dato' Samsudin came out from his room and invited Francis Yong in. After that he went back to his room and did his work. About half an hour later, he said that he heard Dato' Samsudin's and Francis Yong's voices at the reception when both of them came out from Dato' Samsudin's room. After that, since it was a Friday he then left for Friday prayers. When he came back from the Friday prayers – it was in the late afternoon, Dato' Samsudin called him into his office. He said that Dato' Samsudin then instructed him to prepare a cheque for RM6.5 million to be followed by a letter. He did not prepare the cheque immediately because the funds were not in at that time – meaning on 14 November 1997. He said that he prepared the cheques on Monday 17 November 1997. He said that he prepared two cheques totalling RM6.5 million in order to pay the part interest that was due on the term loan facility. He said that he enclosed the two cheques in a letter dated 18 November 1997 as seen in exh. "P26" and that these two cheques together with the letter were sent to Fulcrum by hand. He said that these two cheques were accepted by Fulcrum and that they were cleared. He admitted to the contents of exhs. "P31A" and "P26". In regard to exh. "P27", he said that between 14 November 1997 and 18 November 1997 Fulcrum did not come to him nor contact him to ask for the repayment of the entire balance together with the interests. He said that during the month of October 1997 to the middle of November 1997, he was in contact with the representative of Fulcrum in his capacity as the representative of Rahaz Sdn Bhd. He explained that the representative of Fulcrum was Francis Yong. Up until 18 November 1997, he said that Francis Yong did not request for payment of the balance interest. He said that between October to the middle of November 1997, he was in contact with Francis Yong about once a week. He was referred to the letter at exh. "P27" of p. 131 of bundle "A" and he said that this was a letter from Fulcrum accepting the cheque

of RM6.5 million. He said that the balance interest owing calculated up to 9 October 1997 came up to RM6,344,512. He said that the letter in exh. "P27" did not deny his letter in exh. "P26". He said that upon receipt of the letter which was also copied to Dato' Samsudin he proceeded to fax the said letter to the said Dato'. He said that he did not reply to the letter in exh. "P27" and he ventured a reason. The reason being that upon receipt of exh. "P27", Dato' Samsudin will handle the matter himself. He was referred to exh. "P31A" and he said that it showed that Rahaz Sdn Bhd had to pay the extension fee of RM625,000 which it had paid. He said that the extension fee of RM625,000 was also the roll over fee that was referred to in exh. "P21". He said that Rahaz Sdn Bhd had to pay the extension fee of RM625,000 because this was one of the conditions required to roll over the facility. He was referred to exh. "P28" where there was reference to the sum of RM6,344,512 and he said that Fulcrum did not come back to him to ask him to pay that sum after the two cheques were cleared. He also said that Fulcrum did not call him to ask him to pay after the two cheques were cleared. He was asked as to what he meant by that and he said that by that he meant that Fulcrum had accepted the RM6.5 million and that Fulcrum too had agreed to roll over the balance interest together with the principal as requested by Rahaz Sdn Bhd. He was asked whether he knew that on 14 November 1997 Dato' Samsudin was to meet with the director of Fulcrum on the week beginning 17 November 1997 and he replied in the negative. He said that it was Francis Yong from Fulcrum who had contacted him before 17 November 1997 in regard to such a meeting. He said that Francis Yong contacted him in the morning of Saturday 15 November 1997 while he was in his office at Khidmas Sdn Bhd and told him that the M.D. (managing director) of Fulcrum wanted to bring forward the meeting with Dato' Samsudin on Monday 17 November 1997. On receipt of this piece of information, he relayed the message on the afternoon of 15 November 1997 by fax to Dato' Samsudin who was in Merbok office at that time. He explained that the Merbok office was in Kedah. He asserted that he normally faxed Dato' Samsudin's appointments to him. In regard to exh. "P32" as seen at p. 214 of bundle "A", he said that this was a letter from Fulcrum's solicitors to Rahaz Sdn Bhd relaying the messages that there was default in the payment of interest due and that Fulcrum had cancelled the loan facility. In regard to exh. "P28" as seen at p. 132 of bundle "A", he said that by this letter Fulcrum said that they were unable to accommodate Rahaz Sdn Bhd's request to roll over the balance interest owing to Fulcrum amounting to RM6,344,512. To be exact he said that Fulcrum could not roll over the balance of the interest owing amounting to RM6,344,512. He said that when he received the letter in exh. "P28", he faxed it to Dato' Samsudin. He did not, on his own accord, contact Fulcrum because Dato' Samsudin told him that he – referring to Dato' Samsudin, would handle the matter himself. In regard to exh. "P32" as seen at p. 214 of bundle "A", he said that the sum claimed was RM71,838,012.31. He testified that upon receipt of exh. "P32", he faxed it to Dato' Samsudin. He said that he did not call Fulcrum as the matter would be handled by Dato' Samsudin. He said that in exh. "P31B" as seen at p. 122 of bundle "A", the sum claimed came up to RM71,838,012.30. He said that the sum claimed in exh. "P32" of p. 214 of bundle "A" was RM71,838,012.31 and the difference with exh. "P31B" was a mere one cent. He then repeated the figures that appeared in exh. "P31B" and he said that the plaintiff was not entitled to cancel the facility as

reflected in exh. "P32" of p. 214 of bundle "A" because he said that Rahaz Sdn Bhd had made the payment for the extension fee and as well as for the payment of outstanding interest. He identified the letter at exh. "P34" of p. 225 of bundle "A" and he said that this was a letter of demand for the outstanding sum of the loan facility from Messrs Sri Ram & Co to Rahaz Sdn Bhd and that the sum claimed therein came up to RM79,196,125.22 with interest in the sum of RM70,380,272.95 at the rate of 18% per annum from 1 August 1998 until the date of full settlement. He said that in exh. "P31A" of p. 121 of bundle "A", the sum of RM70,380,272.95 also appeared therein. He said that the difference between the sum of RM70,380,272.95 with the sum of RM79,196,125.22 was in relation to the outstanding interest. He further said that the extension fee appearing in exh. "P31A" of p. 121 of bundle "A" was the same as the one appearing at exh. "P21" of p. 124 of bundle "A".

In regard to para. 14a of the statement of defence at p. 34 of bundle "C", he agreed that the sum of RM6.5 million referred to therein was also reflected at exh. "P26" of p. 130 of bundle "A". He said that the letter in exh. "P26" was written by him and it was amended by Dato' Samsudin at the stage of the first draft. In regard to para. 10(b) of the statement of defence at p. 101 of bundle "C", he also agreed that the sum of RM6.5 million referred to therein was also reflected in exh. "P26". In regard to para. 10(c) of the statement of defence at p. 102 of bundle "C" and para. 21(a) of the statement of claim at p. 81 of bundle "C", he said that the plaintiff was not entitled to claim the sums in paras. 21(a) and 21(b) of p. 81 and p. 82 of bundle "C" and the plaintiff too was not entitled to cancel the loan facility because Rahaz Sdn Bhd have paid the extension fee as well as the sum of RM6.5 million. He was asked and he said that there was a roll over of the facility until 9 April 1998.

In regard to exh. "P21" as seen at p. 124 of bundle "A", he said that Francis Yong issued the fax and he further said that Francis Yong did not say that he was prohibited from sending the fax. He said that in exhs. "P27" of p. 131 of bundle "A" and "P28" of p. 132 of bundle "A", Francis Yong was described in these two letters as the manager. He said that Francis Yong did not tell him that he was prohibited from representing Fulcrum in any way. There was an attempt to introduce a letter dated 15 November 1997 during the examination-in-chief of Azahari and after hearing submissions of counsel for both sides, I ruled that that letter ought not to be shown to Azahari nor marked as an exhibit as the element of surprise and, consequently, prejudice to the plaintiffs would arise. It must be recalled that during the cross-examinations of the plaintiffs' witnesses, the letter dated 15 November 1997 was not shown to the plaintiffs' witnesses and so the defendants' version was not put across. It was certainly incumbent for the defendants to put their case to the plaintiffs. The failure to cross-examine the plaintiffs' witnesses in regard to the letter dated 15 November 1997 was certainly crucial. A case in point would be that of *R. v. Bircham* [1972] Crim. LR 430 where there was a failure to cross-examine and the defending counsel was stopped in his closing speech when he suggested that a co-defendant and a prosecution witness were the perpetrators of the crime. It would also be ideal to refer to the following cases:

(1) *Paric v. John Holland Constructions Pty Ltd* [1984] 2 NSWLR 505 (CA);
(2) *Allied Pastoral Holdings Pty Ltd v. Commissioner of Taxation* [1983] 1 NSWLR 1; and
(3) *Ellis v. Wallsend District Hospital* [1989] 17 NSWLR 553 (CA).

which laid down the principles that the failure to cross-examine a witness on a particular matter may be a good reason for accepting that witness's testimony, but it was not obligatory to accept it. Glass JA in *Wentworth v. Rogers* [1984] 2 NSWLR 422 observed en passant that the alleged victim of a sexual assault had not been cross-examined to suggest that she was lying at the committal hearing. In *R. v. Hart* [1932] 23 Cr. App. R. 202, it was held that where no questions were asked by the opposing party it will generally be taken to mean an acceptance of the witnesses' accounts. In *Browne v. Dunn* [1893] 6 R 67, a libel action, where certain witnesses were not cross-exmained on a particular matter, the House of Lords (Lord Herchell LC, Lord Halsbury, Lord Morris and Lord Bowen) held that it was subsequently improper to invite the jury to disbelieve them. Lord Chancellor Herschell, at p. 70 of the report, had this to say:

> Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact, by some questions put in cross-examination showing that the imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.

Writing a separate judgment, Lord Halsbury said at p. 76 of the report:

> My Lords, with regard to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.

Two more authorities will be alluded to and they are. In *Re Pichi Muthu* [1970] 2 MLJ 143, Sharma J ordered a retrial of the accused on a charge under s. 4(b) of the Prevention of Corruption Act 1961 because:

> The learned president had misdirected himself in ignoring and overlooking the evidence of PW 1 and PW 2 and the total lack of any cross-examination of these witnesses touching the defence which was subsequently suggested for the first time only when the defence was called.

Mukharji J in *AEG Carapiet v. AY Derderian* AIR [1961] Cal 359 aptly said in regard to the value of cross-examination in these words:

> The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing a witness. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated.

These two cases emphasised the need to cross-examine the plaintiffs' witnesses and the failure to do so would certainly cripple the defendants' case.

Reverting back to the mainstream of the case, Azahari was questioned at great length under cross-examination and this was what he said. He confirmed that he was the manager in charge of finance and administration of Khidmas Sdn Bhd. He said that he is an accountant by profession. He agreed that since his niche is accounts, it would be fair and reasonable to assume that he is competent and has a good grasp and understanding of financial statements. He confirmed that he is a director and hold two shares in Rahaz Sdn Bhd. He confirmed that Dato' Samsudin is not a director of Rahaz Sdn Bhd. He confirmed that, at the material time, he was responsible for Dato' Samsudin's personal matters. To a question whether as the personal assistant of Dato' Samsudin he was fully appraised and aware of all of Dato' Samsudin's personal and business affairs, he replied "not all". He then elaborated that as an assistant to Dato' Samsudin he was in charge of his appointments, his expenses, his household bills, his travelling arrangements and his personal banking. He was asked whether he would agree that the loan was not taken for Rahaz Sdn Bhd's benefit and before he could venture an answer, objections were advanced by Mr. Edmund Bon and Mr. T.S. Lim to this line of questioning. Mr. M. Pathmanathan responded by way of a rebuttal. Having heard the submissions of counsel from both sides, I ruled in favour of the plaintiffs and, accordingly, overruled the objection. I allowed the question to remain on the record. Mr. M. Pathmanathan then phrased the same question in a different perspective in this way:

> Do you agree that this loan was taken for the benefit of Landmarks Hotel & Realty Sdn Bhd?

and Azahari replied in the negative: "No".

In overruling the objection, I had in the forefront of my mind the passage from *Halsbury's Laws of England*, 4th edn, at para. 277 which reads as follows:

> Any party is entitled to cross-examine any other party who gives evidence and his witnesses, and no evidence affecting a party is admissible against that party unless the latter had an opportunity of testing its truthfulness by cross-examination.

The purpose of cross-examining a witness is simply to elicit answers in favour of the opposing party and, at the same time, to weaken the evidentiary value of the witness in question. To me, the question posed was not intended to insult or annoy and neither was it offensive in form as envisaged under s. 52 of the Evidence Act 1950. It must be borne in mind that under s. 138 of the Evidence Act 1950, the cross-examination must be confined to relevant facts and further under s. 148 of the same Act, the credibility of a witness is always relevant and questions may certainly be asked in cross-examinations in order to test the veracity of the witness or to shake his credit.

So much for the law.

Continuing further, Azahari testified that the loan was taken for Dato' Samsudin by Rahaz Sdn Bhd in order to pay the balance of the purchase agreement between Bafana Holding Limited and Landmarks Hotel & Realty Sdn Bhd. He agreed that the loan was taken for the benefit of Dato' Samsudin. Azahari was then asked whether Dato' Samsudin had repaid Rahaz Sdn Bhd for the loan taken for his benefit, and again this question was objected to and I then ruled, after hearing the submissions of counsel for both sides, in favour of the plaintiffs. The reply from Azahari to the question posed was that there was partial repayment. He could not remember the sums that were partially paid but he did say that it was set off against all the advances given by Dato' Samsudin to Rahaz Sdn Bhd. He said that it was not correct to say that the board of Rahaz Sdn Bhd which comprised of himself and A. Aziz Ismail acted at the behest of Dato' Samsudin and not independently. He added a caveat when he said that in some matters, he and A. Aziz Ismail had to refer to Dato' Samsudin. He said that since Dato' Samsudin was the major shareholder of Rahaz Sdn Bhd, they needed to refer to him in the general meeting. He said that it was correct to say that Dato' Samsudin owned all the shares of Rahaz Sdn Bhd except the two shares that were owned by him. He was asked as to why he owned the two shares in Rahaz Sdn Bhd and he said that according to the Companies Act 1965 you need to have at least two shareholders. And that was according to him was the only reason. He agreed that if not for that reason, Dato' Samsudin would own all the shares. He emphasised that he owned these two shares beneficially and not as a nominee of Dato' Samsudin. He replied that he was not a nominee director for Dato' Samsudin in Rahaz Sdn Bhd. He was asked the following question:

> If you were directed by Dato' Samsudin to take certain action on behalf of Rahaz, would you do it?

and he replied in this way:

> I would leave it with the other director and to see whether the directive will badly or adversely affect the position of Rahaz Sdn Bhd.

He further testified that when Rahaz Sdn Bhd applied for the loan of RM76,219,512 for Dato' Samsudin's benefit, he and A. Aziz Ismail sat down and discussed about the matter. He was asked whether the discussion centred on whether the loan will badly or adversely affect Rahaz Sdn Bhd or greatly benefit it and he replied that if the loan was properly conducted it will benefit Rahaz Sdn Bhd. He was requested to explain and he explained it in this way. That since the loan was taken for Dato' Samsudin to finalise the balance of the purchase price for the purchase and sale agreement signed between Bafana Holding Limited and Landmarks Hotel & Realty Sdn Bhd – and at that time Dato' Samsudin was the major shareholder and the chairman of Landmarks Hotel & Realty Sdn Bhd, it was, according to him, like an investment to Rahaz Sdn Bhd. He was then asked and he said that he did not really understand the meaning of corporate personality. He was asked as to how the loan of RM76,219,512 which Rahaz Sdn Bhd took for the benefit of Dato' Samsudin was going to benefit Rahaz Sdn Bhd and not Dato' Samsudin personally and he replied in this way:

> As I said it is an investment by Rahaz whereas when Dato' Samsudin as the shareholder of Landmarks succeeds in the sale and purchase agreement between Bafana and Landmarks Hotel as a shareholder of Rahaz Sdn Bhd, whatever benefit that can be derived to Dato' Samsudin as a shareholder of Landmarks it will indirectly go to Rahaz Sdn Bhd.

He agreed that whatever benefit that accrued to Dato' Samsudin, that benefit will also go to Rahaz Sdn Bhd. He was asked whether Dato' Samsudin practically owned Rahaz Sdn Bhd and he replied that the said Dato' held 49998 shares of Rahaz Sdn Bhd. He was asked:

> You agree that it is practically 100%.

and he replied:

> Almost 100%. It is 99.999%.

Despite all these, he disagreed that Dato' Samsudin is the supremo in Rahaz Sdn Bhd and he too disagreed that both he and A. Aziz had no independent say or will on the board of Rahaz Sdn Bhd. He was shown exh. "P3" of p. 4 of bundle "A" particularly at page 11 thereof and he agreed that as a director of Rahaz Sdn Bhd he did sign and accepted the terms and conditions contained in the letter of offer by Fulcrum dated 27 September 1996 and he said that he signed it on 30 September 1996. He said that he had read and understood the terms and conditions of the offer carefully. He said that according to the offer the loan facility that Rahaz Sdn Bhd applied for was RM76,219,512. He was asked:

> Why did you apply for that sum when the purpose was only RM62.5 million?

His reply was:

> As we do not have sufficient fund to cover the upfront fee, it was incorporated in the total loan amount facility.

He was requested whether he would like to correct himself in regard to the phraseology "upfront fee" and he acceded to the request and he replied by way of a correction that it was "upfront interest". He said that the rate of interest for this facility was 18% per annum on RM62.5 million. According to him that interest computed at 18% per annum for RM62.5 million would come up to about RM11 million. He was asked as to why was the loan facility amounted to RM76,219,512 and he replied that since the loan was for Dato' Samsudin, so the requirement of the loan was set out in the drawdown notice given by Fulcrum's solicitors. He emphasised that he did not see the finalised or completed copy of the drawdown notice until the suit started. He agreed that since his niche is accounts and that as a qualified accountant it would be fair and reasonable to assume that he is competent to grasp the accounts and financial statements. When pressed further he still maintained the same stand. He reiterated that he had read and understood the terms and conditions of the offer. He agreed that the loan sum that Rahaz Sdn Bhd applied for was RM76,219,512; whilst the purpose required was only RM62.5 million. He too agreed that the difference was interest payable at 18% per annum on the facility. He was asked in regard to the difference between the facility and the purpose and he replied it was RM13,719,512. He was asked:

> Since you said it was interest and the difference was RM13,719,512.00, why did you not appreciate it when you signed the acceptance on 30 September 1996?

And he gave this answer:

> It doesn't matter what's the principal amount or the interest in the letter of offer. What is important is the amount we borrowed RM76,719,512.00 and the loan was taken for Dato' Samsudin. In the accounting of Rahaz, we would show that Rahaz owes Fulcrum for the sum of RM76,219,512.00 and the corresponding entry will be that Dato' Samsudin will owe Rahaz for the same amount. Basically it will not affect Rahaz. If Dato' were to pay Rahaz for the said amount, we would be able to pay Fulcrum for the said amount.

The exchanges in cross-examination continued. It was indeed interesting. It went like this:

> Q: Please answer the question.
>
> Are you saying that interest charged is wrong?
>
> A: Yes.
>
> Q: Are you saying that in spite of that you signed it on 30 September 1996?
>
> A: Yes.
>
> Q: What about it when you said earlier that the first time you knew of the interest figure was when you had sight of the drawdown notice after the action had been instituted?
>
> A: In the letter of offer, on item no: 2 on the facility it was stated that the total loan amount was RM76,219,512.00 and under item no: 3, the purpose of the loan is to finance RM62.5 million and under item no: 5 it is stated that the interest rate at 18% per annum and it did not say RM13,719,512.00. If we are able to see the drawdown notice duly filled then we would have known that the interest charged was RM13,719,512.00.

Q: You just answered that on 30 September 1996 that the interest charged was wrong?

A: The interest rate stated in the offer letter is right.

Q: Then what was wrong?

A: My answer was wrong earlier. When I said that when I signed the letter I knew the interest rate at that time. Actually I did not know then.

Q: You applied for a loan of RM76,219,512.00 and that was Rahaz's application?

A: Yes

Q: And you needed RM6.5 million?

A: Yes.

Q: And the difference was interest payable at 18% per annum?

A: Not entirely.

Q: Twice in cross-examination you said that the difference was interest. Did you or did you not?

A: Yes, I said it twice.

Q: So you knew at the time when you applied that the interest payable was RM13,719,512.00?

A: No, it was 18%.

He was then shown exh. "P5" of bundle "A" and at p. 47 thereto he agreed that he signed the agreement on behalf of Rahaz Sdn Bhd. But he said that he can't remember the date when he signed the facility agreement in exh. "P5". He was shown the definition of the word "facility" under the facility agreement in exh. "P5" and after having read it he agreed that it was clear that the facility was for the sum of RM76,219,512. He agreed that in s. 6.01 of the facility agreement in exh. "P5" that the interest was listed as 18% per annum and that the "borrower shall pay interest on the facility" at that rate. He was asked as to how much was 18% per annum on the facility of RM76,219,512 and he replied that it was RM13,719,512.

Azahari was very evasive and this prompted Mr. M. Pathmanathan to cross-examine him in this way:

Q: Why are you talking abour RM11 million?

A: If you calculate it based on RM62.5 million, it comes to RM11 million. The loan was for RM76,219,512.00 and not for RM62.5 million. So the 18% per annum interest to be calculated on the basis of RM76,219,512.00 according to the agreement.

Q: According to the agreement the interest is correctly computed?

A: Yes. When I signed the agreement at page 47 of bundle "A", I am already qualified as an accountant. As a qualified accountant, I dabbled with figures, calculations, etc.

Q: So there is no mistake in the facility agreement?

A: No.

Q: And there is no mistake in the letter of offer (page 4 of bundle 'A')?

A: No.

Q: No mistake when you applied for the loan of RM76,219,512.00?

A: No.

Q: The mistake was made by you when calculating interest on RM62.5 million?

A: In the letter of offer (P3 – at page 5 of bundle 'A') it says the rate of interest is 18% per annum to be read upfront. So I will calculate on the 18% of the RM62.5 million and that will be about RM11 million.

Q: Why did you apply for a loan of RM76,219,512.00?

A: Because it is required by Dato' Samsudin.

Q: If you apply for RM76,219,512.00 and the offer for that sum, then the offer was consistent with your application?

A: Yes.

Q: You were at that time in charge of Dato' Samsudin's personal matters?

A: Yes.

Q: At page 5 of bundle 'A' – P3, you pledged the several securities – 6 in all under paragraph 7?

A: Yes.

Q: At page 8 of bundle 'A' you read and understood paragraph 15, paragraph 16?

A: (Witness takes time to answer). Yes.

Q: Under paragraph 7 of bundle 'A' you confirmed you pledged 29,250,000 Merbok Hilir Shares and 65,000.00 SMG Holdings Ltd shares and the entire paid up capital of Rahaz Sdn Bhd and the personal guarantee of Dato' Samsudin?

A: Yes.

Q: What is the difference between RM76,219,512.00 with that of RM62.5 million?

A: It is RM13,719,512.00.

In the course of cross-examining Azahari, an order of the Seremban Syariah High Court dated 24 May 1996 was shown to the witness and this very order was marked as exh. "P68" and the witness confirmed the existence of that order. He agreed that at p. 2 of exh. "P68" his name appeared in the said order. He too confirmed that the order in exh. "P68" listed the assets of Dato' Samsudin that were injuncted. He also confirmed that at p. 3 of the order in exh. "P68", the shares of Merbok Hilir Sdn Bhd and Rahaz Sdn Bhd were injuncted. He agreed that the indorsement at p. 5 of the order as seen in exh. "P68" referred to him also. He also agreed that the indorsement at p. 6 of the order in exh. "P68" were also directed against Rahaz Sdn Bhd and him personally in his capacity as a director. He was then asked as to why on 30 September 1996, he signed exh. "P3" in defiance and in breach of the order of the Syariah Court order as per exh. "P68" and he replied in this way:

> I signed the letter of offer dated 30 September 1996 as I was informed by Dato' Samsudin that the matter between him and Wan Dayang binti Wan Mahmud is settled.

At this juncture, it would be ideal to reproduce in verbatim the Syariah Court order as reflected in exh. "P68":

DALAM MAHKAMAH TINGGI SYARIAH
SEREMBAN NEGERI SEMBILAN
KES SIVIL/MAL 16-6-96P

Dalam perkara Kes Sivil/Mal Bil 12 Tahun 1995 antara Samsudin bin Hj Abu Hassan dan Wan Dayang binti Wan Mahmud

Dan
Dalam perkara Perintah bertarikh 14 haribulan Ogos 1995 dalam Kes Sivil/Mal Bil. 12 Tahun 1995
dan
Dalam perkara Seksyen 106 Enakmen Pentadbiran Keluarga Negeri

ANTARA

WAN DAYANG BINTI WAN MAHMUD PIHAK MENUNTUT

DAN

SAMSUDIN BIN HJ ABU HASSAN PIHAK KENA TUNTUT

DI HADAPAN HAKIM MAHKAMAH TINGGI SYARIAH
YANG ARIF USTAZ ARSHAD BIN HJ. ABD. SAMAD
PADA 24 HARIBULAN MEI 1996 DALAM KAMAR

PERINTAH EX-PARTE

ATAS PERMOHONAN Pihak Menuntut yang dinamakan di atas DAN SETELAH MEMBAWA Notis Permohonan Ex-Parte bertarikh 23hb Mei 1996, afidavit Wan Dayang binti Wan Mahmud yang diikrarkan pada 22hb Mei 1996 dan afidavit tambahan Wan Dayang binti Wan Mahmud yang diikrarkan pada 23hb Mei 1996 DAN SETELAH MENDENGAR Haji Sulaiman bin Abdullah peguam bagi Pihak Menuntut.

ADALAH DIPERINTAHKAN bahawa:

1. Pihak Kena Tuntut, Khidmas Sdn Bhd, Kidmas Capital Sdn Bhd, Khidmas Properties Sdn Bhd, Nilam Jaya Sdn Bhd, Mohd Salleh bin Yeop Abdul Rahman, Rahaz Sdn. Bhd, Muthana Abdullah, Abdul Aziz bin Ismail, Mohd Azahari bin Abu Kassim atau mana-mana ajen-ajen, penama-penama, pekerja-pekerja atau wakil-wakil mereka ditegah dan dilarang dari menjual, memindahmilik, mencagar, memajak, menggadai, menyerah, memasuki apa-apa perjanjian atau hubungan sama ada secara formal dan bertulis atau pun tidak untuk melupuskan atau secara apapun melupuskan atau bertindak dengan apa cara juapun dengan mana-mana harta yang dipegang di bawah namanya bagi pihak Pihak Kena Tuntut termasuk tetapi tidak terhad kepada yang tersenarai di sini:-

	Harta	**Dipegang oleh**
a.	'Penthouse' bernombor 15-5-4 di The Sanctuary, 15 Tinggian Tunku Bukit Tunku, 50480 Kuala Lumpur	Nilam Jaya Sdn. Bhd.
b.	Sekeping tanah HS(D) 36083 PT No. 38272 Mukim Daerah Kelang	Nilam Jaya Sdn. Bhd.
c.	Kereta Mitsubishi Pajero bernombor plat WDC555	Khidmas Sdn Bhd

d.	Kereta Honda Accord bernombor plat WCS 8988	Khidmas Sdn Bhd
e.	Apartmen bernombor 259-1-8, 259-2-8 283-2-3, 283-2-6 di Casaria Apartments Taman Maluri Cheras.	Khidmas Properties Sdn. Bhd.
f.	Unit No. 1A-1-1, Blok A Sri Kasturina Condominium, Bangsar	Khidmas Properties Sdn. Bhd.
g.	Saham Merbok MDF Sdn Bhd/ Hilir Sdn Bhd	Mohd Salleh bin Merbok Yeop Abdul Rahman & Rahaz Sdn. Bhd.
h.	Saham syarikat Khidmas Sdn. Bhd.	Samsudin bin Hj Abu Hassan
i.	Saham syarikat Khidmas Capital Sdn Bhd	Samsudin bin Hj Abu Hassan
j.	Saham Nilam Jaya Sdn Bhd	Khidmas Properties Sdn Bhd
k.	Saham Khidmas Properties Sdn Bhd	Khidmas Sdn. Bhd.
l.	Rahaz Sdn Bhd	Samsudin bin Hj Abu Hassan Muthana Abdullah & Abdul Aziz bin Ismail
m.	Saham Mitrajaya Holdings Bhd	Khidmas Sdn. Bhd.

sehingga kesemua jumlah yang harus dibayar oleh Pihak Kena Tuntut kepada Pihak Menuntut ataupun anak-anak mereka di bawah Perintah bertarikh 14hb Ogos 1995 telah diselesaikan dengan sepenuhnya; dan

2. Kos permohonan ini ditanggung oleh Pihak Kena Tuntut.

Bertarikh pada 28 haribulan Mei 1996

t.t. (Illegible)

Pendaftar	Hakim
Mahkamah Tinggi Syariah	Mahkamah Tinggi Syariah
Negeri Sembilan	N. Sembilan D. Khusus.
SEREMBAN	

INDORSMEN

Jika kamu, Samsudin bin Hj Abu Hassan (KP No. 4917676), yang dinamakan mengingkari perintah ini, kamu boleh dikenakan proses pelaksanaan bagi maksud memaksa kamu mematuhinya.

INDORSMEN

Jika kamu, Mohd Salleh bin Yeop Abdul Rahman (KP No. 0581839), yang dinamakan mengingkari perintah ini, kamu boleh dikenakan proses pelaksanaan bagi maksud memaksa kamu mematuhinya.

INDORSMEN

Jika kamu, Muthana bin Abdullah (KP No. 5856733), yang dinamakan mengingkari perintah ini, kamu boleh dikenakan proses pelaksanaan bagi maksud memaksa kamu mematuhinya.

INDORSMEN

Jika kamu, Abdul Aziz bin Ismail (KP No. 4873518), yang dinamakan mengingkari perintah ini, kamu boleh dikenakan proses pelaksanaan bagi maksud memaksa kamu mematuhinya.

INDORSMEN

Jika kamu, Mohd Azahari bin Abu Kassim (KP No. 6996429), yang dinamakan mengingkari perintah ini, kamu boleh dikenakan proses pelaksanaan bagi maksud memaksa kamu mematuhinya.

INDORSMEN

Jika Khidmas Sdn. Bhd, mengingkari perintah ini, kamu, Samsudin bin Hj Abu Hassan (KP No. 4917676) seorang pengarah atau Abdul Aziz bin Ismail (KP No. 4873518), seorang pegawai dalam Khidmas Sdn Bhd boleh dikenakan proses pelaksanaan bagi maksud memaksa yang tersebut itu mematuhinya.

INDORSMEN

Jika Khidmas Capital Sdn Bhd, mengingkari perintah ini, kamu, Samsudin bin Hj Abu Hassan (KP No. 4917676) seorang pengarah atau Mohd Azahari bin Abu Kassim (KP No. 6996429), seorang pegawai dalam Khidmas Capital Sdn Bhd boleh dikenakan proses pelaksanaan bagi maksud memaksa yang tersebut itu mematuhinya.

INDORSMEN

Jika Khidmas Properties Sdn Bhd, mengingkari perintah ini, kamu, Samsudin bin Hj Abu Hassan (KP No. 4917676) seorang pengarah atau Mohd Azahari bin Abu Kassim (KP No. 6996429), seorang pegawai dalam Khidmas Properties Sdn Bhd boleh dikenakan proses pelaksanaan bagi maksud memaksa yang tersebut itu mematuhinya.

INDORSMEN

Jika Nilam Jaya Sdn Bhd, mengingkari perintah ini, kamu, Abdul Aziz bin Ismail (KP No. 4873518) atau Mohd Azahari bin Abu Kassim (KP No. 6996429), seorang pegawai dalam Nilam Jaya Sdn Bhd boleh dikenakan proses pelaksanaan bagi maksud memaksa yang tersebut itu mematuhinya.

INDORSMEN

Jika Merbok MDF Sdn Bhd, mengingkari perintah ini, kamu, Gwee Ooi Teng (KP No. 630608-10-6740), seorang pegawai dalam Merbok MDF Sdn Bhd boleh dikenakan proses pelaksanaan bagi maksud memaksa yang tersebut itu mematuhinya.

INDORSMEN

Jika Merbok Hilir Sdn Bhd, mengingkari perintah ini, kamu, Gwee Ooi Teng (KP No. 630608-10-6740), Setiausaha dalam Merbok Hilir Sdn Bhd atau Mohd Salleh bin Yeop Abdul Rahman, (KP No. 6581839) seorang Pengarah dalam Merbok Hilir Sdn Bhd boleh dikenakan proses pelaksanaan bagi maksud memaksa yang tersebut itu mematuhinya.

INDORSMEN

Jika Rahaz Sdn. Bhd. mengingkari perintah ini, kamu Mohd Salleh Yeop Abdul Rahman (KP No. 6581839), seorang Pengarah dalam Rahaz Sdn. Bhd. atau Mohd Azahari Bin Abu Kassim (KP No. 6996429), seorang setiausaha dalam Rahaz Sdn. Bhd. boleh dikenakan proses pelaksanaan bagi maksud memaksa yang tersebut itu mematuhinya.

Kepada:

1. Muthana bin Abdullah
(KP No. Biru 5856733)
47 Langgak Tunku
50480 Kuala Lumpur
Hing Kuala Lumpur

dan/atau di alamat pejabat:
Abdullah A. Rahman & Co.
Peguambela dan Peguamcara
Tingkat 18, Wisma Hamzah Kwong

2. Abdul Aziz bin Ismail
(KP No. Biru 4873518)
15 Jalan 3A/55A
Taman Setiawangsa
54200 Kuala Lumpur

3. Mohd Azahari bin Abu Kassim
(KP No. Biru 6996429)
2 Jalan Dabus 11/2D
40000 Shah Alam
Selangor Darul Ehsan

4. Mohd Salleh bin Yeop Abdul Rahman
(KP No. Biru 6581839)
82, Jalan Keruing
Bukit Bandaraya
59100 Kuala Lumpur

5. Setiausaha kepada Merbok Hilir Sdn Bhd dan Merbok MDF Sdn Bhd

Gwee Ooi Teng
(KP No. Biru 630608-10-6740)
15 Jalan SS25/4
47301 Petaling Jaya
Selangor Darul Ehsan

dan/atau dipejabat berdaftar syarikat:
(i) Merbok Hilir Sdn Bhd
Bilik 402 Tingkat 4
Bangunan NUBE
114 Jalan Tuanku Abd. Rahman
50100 Kuala Lumpur

(ii) Merbok MDF Sdn Bhd
Tingkat 6.56 Jalan Tuanku
Abdul Rahman
50100 Kuala Lumpur

6. Setiausaha kepada Khidmas Capital, Khidmat Properties Sdn. Bhd., Khidmas Sdn. Bhd. dan Rahaz Sdn Bhd;
Mohd Azahari bin Abu Kassim
(KP No. Biru 6996429)
2 Jalan Dabus 11/2D
40000 Shah Alam
Selangor Darul Ehsan

dan/atau di pejabat berdaftar syarikat:
Peti Surat 28, Tingkat 3
Wisma Socfin, Jalan Semantan
50490 Kuala Lumpur

Setiausaha kepada Nilam Jaya
Mohd Azahari bin Abu Kassim
(KP No. Biru 6996429)
2 Jalan Dabus 11/2D
40000 Shah Alam
Selangor Darul Ehsan

dan/atau di pejabat berdaftar syarikat:
Batu 4 ½ Jalan Ipoh
52100 Kuala Lumpur

t.t. (Illegible).

Pendaftar	Hakim
Mahkamah Tinggi Syariah	Mahkamah Tinggi Syariah
Negeri Sembilan	N. Sembilan D. Khusus
SEREMBAN	

Perintah Ex-Parte ini difailkan oleh Tetuan Zain & Co., alamat penyampaian Tingkat 6 & 7, Bangunan Dato' Zainal, 23 Jalan Melaka, 50100 Kuala Lumpur. Peguam bagi pihak Menuntut. No Telefon: 2986255 faks: 2986969/2922400.

He admitted that as Dato' Samsudin's personal assistant and having conduct of the said Dato's personal matters and as a person against whom exh. "P68" order was directed, he was aware of the Syariah proceedings in the Syariah High Court. He said that he was aware of the consequences of the Syariah High Court order. To a question as to when was the Syariah High Court order set aside, he replied that he had no idea and he also replied that he was informed by Dato' Samsudin that the order of the Syariah High Court was set aside. He was asked whether he had ascertained if and when the Syariah High Court order was set aside and he replied in the negative. He said that Dato' Samsudin did not tell him that the matter was settled and neither did the said Dato' tell him on what date it was settled. He was asked whether he subsequently found out if and when it was settled and he replied in the negative. Mr. T.S. Lim was not pleased with the style of cross-examination as adopted by Mr. M. Pathmanathan and the transcript of the notes of evidence showed the following exchanges between the two learned counsel:

Lim: The line of questioning is irrelevant.

Pathma: The question will show the inaccuracies and lack of credibility of this witness and thus far, I have shown to a large extent that the witness is prepared to be frivolous in the face of written documents and contemptuous and having utter disregard for court orders and proceedings. By his last answer the witness has shown that he is prepared to recklessly disregard an order of the Syariah High Court solely on the word of Dato' Samsudin; he is prepared to go to jail for contempt and hence the relevance of this questioning.

Lim: The answers so far, if anything, show that the witness has acted in good faith whether he was legally wise or not is beside the point. Apart from the fact that there is no relevance to this line of questioning unless Fulcrum was facilitating a contempt of court otherwise the letters of offer were signed and Fulcrum happily realised some of its securities without a murmur. I say that we have been taken by surprise.

Pathma: This document (P68) exhibited in these proceedings in which DW1 had signed several affidavits and he knows fully well when this order was set aside. In fact, it was subsisting and in force on 30 September 1996.

Having heard these submissions, I then overruled the objection. I must place on record that I did not descend into the arena by intervening when the witnesses testify. I merely hearken to the evidence. Lord Denning MR in *Jones v. National Coal Board* [1957] 2 QB 55, 62 emphasised the importance of a judge to adopt a detached view and this is how his Lordship put it:

> Yes, he (the judge) must keep his vision unclouded. It is all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth: and the less dust there is about the better: Let the advocates one after the other put the weights into the scales – the nicely calculated 'less or more' – but the judge at the end decides which way the balance tilts, be it ever so slightly … . So also it is for the advocates, each in turn, to examine the witnesses, not for the judge to take it on himself lest by so doing he appears to favour one side or the other … . And it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost …. . The judges' part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition, to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robes of an advocate; and the change does not become him well. Lord Chancellor Bacon spoke right when he said that:
>
> > Patience and gravity of hearing is an essential part of justice; an overspeaking judge is no well-tuned cymbal.

The cross-examination of Azahari, then continued. It was put to him that exh. "P68" was valid and subsisting on 30 September 1996 and he replied that Dato' Samsudin had informed him that it had been settled. To a question whether he would agree that if exh. "P68" was subsisting on 30 September 1996, he would be guilty of breaching the court order and be in contempt of court and his reply was:

> Yes, I believe so.

He agreed that at p. 108 to p. 122 of bundle 'A', it showed the statements of accounts from Fulcrum to Rahaz Sdn Bhd from 31 October 1996 to 31 December 1997. He confirmed that he had received these statements of accounts. He said that he will show to Dato' Samsudin the statements of accounts when the said Dato' came back to Malaysia. He was then asked:

> Were you then not telling the truth under examination-in-chief when you said that you faxed the statements of accounts to Dato' Samsudin?

and he replied:

> I showed it to him.

He said that in regard to exh. "P30", he had shown it to Dato' Samsudin by faxing it to him. However, he did not do the same for the other statements of accounts as seen at p. 108 to p. 122 of bundle "A". He testified that, just like Dato' Samsudin, he too was aware of all these statements of accounts. He said that he was aware of the notes at the bottom of all the statements of accounts which said that the balances

would be considered correct unless Fulcrum was notified of any discrepancy within 14 days. He too agreed that this was consistent with the terms and conditions of the facility agreement in that the statements were deemed conclusive. He said that neither he, acting on behalf of Rahaz Sdn Bhd, nor Dato' Samsudin, at any time prior to the institution of these two actions, dispute or challenge any of these statements. In regard to p. 120 of bundle "A" ("P30"), p. 121 of bundle "A" ("P31A"), and p. 122 of bundle "A" ("P31B"), he said that these three statements included a sum of RM625,000 for an extension fee. He said that these statements gave Rahaz Sdn Bhd credit for all the payments that were made in October and November 1997. He agreed that the statement in exh. "P30" stated that the loan was overdue on 9 October 1997. He agreed that it further stated that late interest at 18% per annum shall be calculated on a daily basis. He agreed that the statements in exhs. "P30", "P31A" and "P31B" imposed late interest charges w.e.f. 10 October 1997. He knew that late interest was imposed on 10 October 1997 because the loan was due on 9 October 1997. He confirmed that Rahaz did not repay the loan on the due date. In regard to exh. "P20" as seen at p. 123 of bundle "A", he confirmed that Rahaz Sdn Bhd was not in a position to repay the loan on the maturity date. He confirmed that Rahaz Sdn Bhd requested for a roll over for six months on 23 September 1997. In regard to exh. "P21" of p. 124 of bundle "A", he admitted that this was the reply from Fulcrum in regard to the roll over. He said that in exh. "P21", Francis Yong stated that the authority to approve the loan vested with the board of Directors and Tan Sri Dato' Azman Hashim. He said that exh. "P21" stated that the loan was pending approval from Tan Sri Dato' Azman Hashim. He said that there were conditions prior to the granting of the approval for a roll over of six months and that would be the interest up to 9 October 1997 amounting to RM13,719,512 and a roll over fee of 1% flat on the principal amount amounting to RM625,000 to be paid by Rahaz Sdn Bhd. He rounded it up by saying that the total sum that Rahaz Sdn Bhd had to pay prior to the granting of a roll over of the loan for six months was RM14,344,512 and that the dateline for payment would be on 9 October 1997. The crucial parts of the cross-examination went like this:

Q: Do you agree with me that the full sum of RM14,344,512.00 had to be paid by Rahaz prior to the granting of an extension of time to roll over for 6 months until 9.4.98?

A: Yes.

Q: Do you agree with me that Rahaz did not pay the entire sum of RM14,344,512.00?

A: Yes.

Q: Do you agree with me that no monies were paid by that dateline (referring to 9 October 1997)?

A: Yes.

Q: Do you agree with me that Fulcrum was prepared to consider extending the loan for 6 months on payment of RM14,344,512.00 on the principal amount of RM62.5 million only?

A: Yes.

Q: And that was why the roll over fee of 1% amounting to RM625,000.00 was based on RM62.5 million?

A: Yes.

Q: The sum of RM13,719,512.00 referred to at page 124 of bundle 'A' represents the repayment of the interest portion of the loan?

A: Yes.

Q: As a qualified accountant and a director of Rahaz, you know and understood that?

A: Yes.

The cross-examination of Azahari was indeed meticulous. No stones were left unturned. Azahari was asked:

Q: So, would it be correct to say that Rahaz agreed to pay back the interest portion of the loan amounting to RM13,719,512.00 and to the extension fee of RM625,000.00 to enable Fulcrum to consider rolling over of the facility of RM62.5 million until 9 April 1998?

A: Yes.

Q: Do you confirm as at end of October 1997 Rahaz was not able to pay the full RM14,344,512.00 but only paid RM1.5 million on 22 October 1997?

A: Yes.

The cross-examination of Azahari continued and he was asked:

Q: At page 130 of bundle 'A' shown – you confirm that on 18.11.97 Rahaz paid RM6.5 million to Fulcrum?

A: Yes.

Q: Do you confirm that no further payments were made by Rahaz to Fulcrum towards the conditions precedent of RM14,344,512.00?

A: Yes.

Q: Do you confirm that Rahaz only paid RM8 million (RM1.5 million plus RM6.5 million) and leaving a balance of RM6,344,512.00?

A: Yes.

Q: Do you confirm that Rahaz failed to fulfil the conditions precedent to Fulcrum to enable Fulcrum to agree to roll over RM62.5 million of the loan facility?

A: Yes.

In regard to the letter marked as exh. "P27", Azahari was asked the following questions:

Q: Did Rahaz consider P27 an important letter?

A: Yes.

Q: Did Rahaz or Dato' Samsudin reply to P27?

A: No.

Azahari agreed that he received exh. "P28" as seen at p. 132 of bundle "A" and thereafter he faxed the said exhibit to Dato' Samsudin. He agreed that by para. 2 of exh. "P28", Rahaz Sdn Bhd was informed by Fulcrum that the latter was unable to accommodate the request by Rahaz Sdn Bhd to roll over the sum of RM6,344,512. He too agreed that by para. 3 of the letter in exh. "P28" he was given the final ultimatum to fully settle the sum of RM6,344,512. He said that by para. 4 of the

letter in exh. "P28", Fulcrum gave him seven days from 4 December 1997 to come up with an acceptable proposal failing which Fulcrum will take steps to recover that sum and the entire amount owing. He was asked as to whether Rahaz Sdn Bhd or Dato' Samsudin replied or responded to the letter in exh. "P28" by the dateline given and he replied that since the matter was now being handled by Dato' Samsudin, Rahaz Sdn Bhd did not make any reply to the said letter. He was specifically asked whether Dato' Samsudin respond or reply to the letter in exh. "P28" and he replied that he did not know. In regard to a facsimile document marked as "D38" that was dated 4 November 1997, he said that he did not receive it. Continuing with his cross-examination, Azahari testified that he did not know who the MD of Fulcrum was. He was asked and he said that he did not know that Dato' Jimmy Lim was not the MD of Fulcrum. He was asked whether Dato' Samsudin was in Malaysia on 9 October 1996 when the facility agreement and security document were executed and he replied that if the security document was signed on 9 October 1996 then Dato' Samsudin was in Malaysia. In regard to the Power of Attorney in exh. "P16", he was asked to confirm whether Dato' Samsudin's signature appeared at the top right hand column and he merely replied that the said Dato' signed it on 3 October 1996. He said matter of factly that if Dato' Samsudin were to sign the security document on 9 October 1996 then the said Dato' would be in town. He was pressed further and he was asked whether based on his knowledge Dato' Samsudin was in town on 9 October 1996 and he replied that he can't remember. In regard to the memorandum of charge of shares (third party) dated 9 October 1996 marked as exh. "P15", he identified the signature of Dato' Samsudin at the top right hand column of p. 64 of bundle "A" but he said that he cannot remember when the said Dato' had signed it because it was not stated therein. He was asked whether he had the opportunity to look into his diary where he had kept the recordings of the whereabouts of Dato' Samsudin in October 1996 and he replied that he only kept the appointment dates of the said Dato'. He added further that he did not keep the diary of Dato' Samsudin nor did he keep track in regard to the said Dato's whereabouts. He was asked in what documents were the records of appointments of Dato' Samsudin being recorded in and he replied that normally in the morning if the said Dato' was in town, they would type it and put it on the table. He testified that he was not able to ascertain whether Dato' Samsudin was in Malaysia on 9 October 1996. He admitted that he and Aziz Ismail were the persons who gave instructions to the solicitors on behalf of Rahaz Sdn Bhd in regard to these two consolidated actions. He agreed that he was aware of all that had transpired in regard to these proceedings up to the point of time when he left Rahaz Sdn Bhd and that was in April 2000. He was asked whether he was aware of all that had transpired between the time of signing the letter of offer dated 30 September 1996 and the facility agreement dated 9 October 1996 and he replied that he was aware at that time but now he could not recall. He agreed that if Dato' Samsudin was not in town during these proceedings he would be the next important person to give information in respect of these proceedings. He said that he was not sure whether Dato' Samsudin was not in Malaysia on 9 October 1996. In regard to a fax letter dated 9 October 1996 marked as exh. "P69" which was a letter from Dato' Samsudin to Messrs Iza Ng Yeoh & Kit, he initially said that he had not seen the said letter.

But when he was asked, after the said letter was marked as exh. "P69", whether he was now able to remember on the basis of exh. "P69" whether Dato' Samsudin was or was not in Malaysia he said that the said Dato' was not in Malaysia. He agreed that he might have had sight of all the letters received by Rahaz Sdn Bhd marked for his attention during the crucial period of 9 October 1996. He said that if the letter was from a firm of solicitors marked for his attention he would have received the said letter.

Still under cross-examination, Azahari was shown a letter dated 7 October 1996 from Messrs Iza Ng Yeoh & Kit to Rahaz Sdn Bhd for the attention of Dato Samsudin/ Encik Azahari and that letter was marked as exh. "P70" and he was asked whether he had seen that letter before and whether he remembered receiving that letter. He then replied that he should receive the letter as per exh. "P70" but he said that he can't remember as it was four years ago. He agreed that the contents of the letter in exh. "P70" was very grave and serious. Exhibit "P70" was worded in this way:

RAHAZ SDN. BHD.
TERM LOAN FACILITY OF RM76,219,512.00

We refer to the above matter.

We have been instructed by our client, Fulcrum Capital Sdn. Bhd. that in breach of the terms contained in our client's letter of offer dated 27 September 1996, you have concealed and/or omitted material facts in the application for the above Facility.

In particular, the Memorandum of Charge of Shares and Power of Attorney to be executed in respect of shares of Rahaz Sdn. Bhd. and Merbok Hilir Sdn. Bhd. is in contravention of the injunction dated 24 May 1996 obtained by Wan Dayang bt Wan Mahmud.

In the circumstances, our client is unable to allow drawdown or disbursement of the Facility unless and until the said injunction has been discharged and evidence of the same is forwarded to our client.

Kindly take note accordingly.

Yours faithfully,

for IZA NG YEOH & KIT
Sgd. (Illegible)
YEOH CHONG KENG

c.c. Client
[Attn: Mr Francis Yong].

Azahari then reiterated that he should receive the letter as per exh. "P70". He was then asked as to what he did when he received the letter as per exh. "P70" and he replied that he might have shown it to Dato' Samsudin if he was in town or he might have faxed it to the said Dato' if the latter was in South Africa. He elaborated further. He said that before he signed the letter of offer he had already discussed about the shares with Dato' Samsudin and the latter had said that the matter had settled. So, according to him, it was up to Dato' Samsudin to settle the matter. He agreed that he had signed the letter of offer on 30 September 1996 on the assurance by Dato' Samsudin that the matter had been settled. He agreed that he was alarmed that seven (7) days later on 7 October 1996 Fulcrum was refusing to give a drawdown on the basis that the injunction was still valid and in existence. He

admitted that he was aware of the grave consequences to him personally if the order of the Syariah Court was still subsisting. He was asked as to what would he do in order to ascertain for himself if the order of the injunction was still subsisting or had in fact been settled and he replied that as this was a matter between Dato' Samsudin and Wan Dayang binti Wan Mahmud – the ex-wife of Dato' Samsudin, he believed that the said Dato' would take the necessary action not to be put in that situation. He added further and he said that he had referred the matter to Dato' Samsudin and the said Dato' may have promised to ensure that the matter was settled. He was then asked:

> This is not a matter entirely between Dato' Samsudin and his ex-wife because your name is expressly stated in the injunction order with a notice that you will be liable for committal if the order is breached. Dato' Samsudin did not sign the letter of acceptance, you did, so please tell the court what you did on 7.10.96 when you received this letter?

and he replied:

> Again as I mentioned earlier, if Dato' is in town I would have shown to him and ask for clarification and if he is in South Africa I would ask for clarification and confirmation whether Dato' would take immediate action to rectify this matter.

He agreed that he functioned as Dato' Samsudin's personal assistant in handling other matters other than the said Dato's divorce matter. He added that Dato' Samsudin should have a lawyer to handle his divorce matter. He agreed that the divorce matter of Dato' Samsudin was an impediment to the loan taken by Rahaz Sdn Bhd and it had personally exposed him to contempt proceedings. He was asked whether he was still asking the court to believe that apart from faxing the letter to Dato' Samsudin, he too was alarmed at the state of affairs. To this he replied that he did not have any solicitor or lawyer to refer to and that he believed the assurance given by Dato' Samsudin that the matter would be settled and he further said that he did not have any reason to disbelieve the said Dato'. A pertinent question was asked under cross-examination of Azahari and it was as follows:

> Was the faith and confidence you placed in Dato' Samsudin misplaced or was it unjustified?

and he replied in this way:

> Now I believe it was misplaced.

It was put to Azahari that the order of the Syariah High Court in Seremban dated 24 May 1996 was only varied on 8 October 1996 by a consent order of that date – a draft consent order dated 8 October 1996 marked as exh. "P71" was shown to Azahari and he willingly said:

> Yes, I agree with you.

He was then referred to exh. "P67" and he was asked whether the figures appearing in exh. "P67" were consistent with the figures that appeared in exh. "P31A" save for the figures that appeared at the bottom of the box and he answered it in the positive. He added that in exhs. "P67" and "P31A", the interests for 42 days from

20 November 1997 to 31 December 1997 have been considered. He said that in exh. "P31A" the interests from 1 January 1998 to 31 October 1900 were not incorporated but those interests were incorporated in exh. "P67". He said that the statement in exh. "P67" included the interests from 1 January 1998 to 31 October 2000. He also said that the statement in exh. "P67" had deducted the monies from Fleming Martin Securities and from the dividends of Merbok shares. He agreed with the proposition that exh. "P67" represented the correct and true statements of accounts between Fulcrum and Rahaz Sdn Bhd save and except the alleged extension of six (6) months claimed by Rahaz Sdn Bhd. He admitted that he executed a statutory declaration on 9 October 1996 as seen in exh. "P72". He agreed that at para. 4 of the statutory declaration in exh. "P72" he had solemnly declared under oath that the shares of Rahaz Sdn Bhd held by him and the shares of Merbok Hilir held by Rahaz Sdn Bhd were free from all claims charges liens mortgages pledges option trusts or other encumbrances whatsoever whether legal or equitable and that no law regulation or order of any governmental authority agency or court of any jurisdiction whatsoever will be contravened by the execution delivery or performance of the security documentation. It would be ideal, at this juncture, to reproduce in verbatim the statutory declaration in exh. "P72" and I must do so now:

STATUTORY DECLARATION

I, MOHD AZAHARI BIN ABU KASSIM (NRIC NO. 6996429) of full age of No. 2, Jalan Dabus 11/2D, 40000 Shah Alam do solemnly and sincerely declare as follows:-

1. I hereby declare that I am aware that FULCRUM CAPITAL SDN. BHD. (Local No. 193390-V), a licensed moneylender exempted from the provisions of the Moneylenders Act 1951, a company incorporated in Malaysia and having its registered office at 1st Floor, Lot 271, Jalan Dua, Off Jalan Chan Sow Lin, 55200 Kuala Lumpur and having its place of business at 3rd Floor, Lot 271, Jalan Dua, Off Jalan Chan Sow Lin, 55200 Kuala Lumpur ('the Lender') has agreed to grant in principle a term loan facility up to the aggregate of RM76,219,512.00 to RAHAZ SDN. BHD. (Local No. 222838-V), a company incorporated in Malaysia and having its registered office at Box #28, 3rd Floor, Wisma SOCFIN, Jalan Semantan, 50490 Kuala Lumpur ('the Company') against the security of, *inter alia*:-
   (a) a Memorandum of Charge of Shares [in respect of shares held in the Company] and a Power of Attorney to be executed by me in favour of the Lender;
   (b) a Memorandum of Charge of Shares [in respect of shares held in Merbok Hilir Sdn. Bhd. (Company No. 321155-K)] and a Power of Attorney to be executed by the Company in favour of the Lender.
2. In the premises I hereby declare that as (at) the date hereof I have not committed any act of bankruptcy and/or that I am not aware of any bankruptcy proceedings having been instituted against me personally.
3. I am a director of the Company and I further declare that the Company has not been wound up as at the date hereof, and that there are no winding-up proceedings instituted, pending or threatened against the said Company.
4. I further declare that:-

(a) the shares of the Company held by me; and
(b) the shares of Merbok Hilir Sdn. Bhd. held by the Company;

are free from all claims charges liens mortgages pledges option trusts or other encumbrances whatsoever whether legal or equitable, and that no law regulation or order of any governmental authority agency or court of any jurisdiction whatsoever will be contravened by the execution delivery or performance of the security documentation referred to above.

AND I MAKE THIS SOLEMN DECLARATION, conscientiously believing the same to be true and in accordance with the provisions of the Statutory Declaration Act 1960.

Subscribed and solemnly
declared by the abovenamed
MOHD AZAHARI BIN ABU KASSIM
at WILAYAH PERSEKUTUAN
this day – 9 OCT 1996

PESURUHJAYA SUMPAH MALAYSIA
Sgd. (Illegible)
Commissioner for Oaths

19th Floor,
Bangunan Dato' Zainal
23 Jalan Melaka
50100 Kuala Lumpur

Azahari was then asked the following question:

> You can confirm that the only basis you had in signing P72 was Dato' Samsudin's word to you before 30 September 1996 that the order of the Syariah Court dated 24 September 1996 (P71) has been settled?

and he replied:

> This SD (P72) was prepared before hand. I am only advised to sign this declaration in front of the Commissioner for Oaths by Messrs Iza Ng Yeoh & Kit upon confirmation that the injunction on the shares have been lifted.

I will now proceed to narrate the re-examination of Azahari. In his re-examination he was referred to exh. "P29" at p. 212 of bundle "A", and he denied that exh. "P29" was either sent to him or to Rahaz Sdn Bhd. He said that he is an accountant by profession and that he did not practice law. In regard to exh. "P3" as seen at p. 4 of bundle "A", he said that the loan sum was in the sum of RM76,219,512. And that at p. 5 of bundle "A" of exh. "P3", the rate of interest was itemised at 18% per annum. He alluded to s. 6.01 of the facility agreement in exh. "P5" and he said that the rate of interest was stated to be at 18% per annum. He said that under the loan a sum of RM62.5 million was disbursed to Rahaz Sdn Bhd. He agreed that the sum of RM62.5 million was part of the loan sum. He was asked whether it was stated anywhere in s. 6.01 of p. 31 of bundle "A" of the facility agreement in exh. "P5" as to how the rate of 18% has to be calculated and he replied that the rate shall be calculated upon the disbursement of the facility or any part thereof. He said that it did not mention any specific sum that the interest rate to be calculated. He was asked that under cross-examination he had said that under the

facility agreement as far as interest was concerned it was correct and he was asked to clarify as to what he meant by that. He replied that the interest was calculated against the loan sum of RM76,219,512. He further said that the interest of RM13,719,512 would be correct. He was asked whether he had used RM76,219,512 and it was emphasised whether this amount was disbursed to him. He replied that the amount disbursed was RM62.5 million. He said that exh. "P3" as seen at p. 4 of bundle "A" was prepared by Fulcrum. He said that exh. "P5" as seen at p. 20 of bundle "A" – namely, the facility agreement, was prepared by Fulcrum's solicitors Messrs Iza Ng Yeoh & Kit. He said that at p. 22 of bundle "A", the word "Facility" is defined as a term loan facility of up to the aggregate principal sum of RM76,219,512 only granted or agreed to be made available by the lender to the borrower pursuant to the terms of this agreement and includes any part or balance thereof. In regard to the letter in exh. "P22" as seen at p. 125 of bundle "A", he said that he did not sign on behalf of Rahaz Sdn Bhd an acceptance of the said letter. He said that Rahaz Sdn Bhd did not accept the letter in exh. "P22". He too said that Rahaz Sdn Bhd did not accept the terms of the letter in exh. "P22". In regard to the letter in exh. "P27" as seen at p. 131 of bundle "A", he said that Rahaz Sdn Bhd did not accept the terms as stipulated in the said letter. Reverting back to the letter in exh. "P22", he said that Fulcrum did not say that Rahaz Sdn Bhd had accepted the terms and conditions as stipulated in the said letter. He also said that by virtue of the letter in exh. "P27", Fulcrum confirmed that Rahaz Sdn Bhd had accepted the letter dated 10 October 1997 which was marked as exh. "P22". In regard to exh. "P26" as seen at p. 130 of bundle "A", he said that the sum of RM6.5 million was part payment of the interest due upon which Fulcrum agreed to roll over the extension and that Fulcrum will not take any legal action against Rahaz Sdn Bhd. Azahari was then asked under re-examination the following questions and he too gave the answers:

Q: Were any further payments made?

A: No.

Q: Why?

A: As far as Rahaz is concerned upon acceptance of this RM6.5 million the balance of interest and the principal is to be rolled over for a further 6 months period expiring 9 April 1998.

Q: Did you pay the RM6.5 million upon the terms stated in P26 – page 130 of bundle 'A'?

A: Yes.

In regard to exh. "P30" as seen at p. 120 of bundle "A", Azahari was asked this question:

Q: Has Rahaz paid the extension fee of RM625,000.00?

A: Yes.

Q: Is this the same extension fee set out at page 125 at paragraph (ii) of bundle 'A' marked as exhibit P22?

A: Yes. Fulcrum accepted this payment.

Q: What does that mean to you?

A: By accepting the extension fee of RM625,000.00 Fulcrum has agreed to roll over the extension. Now, witness says, roll over the balance of interest and the principal sum for a further 6 months until 9.4.1998.

In regard to exh. "P70", Azahari was asked as to whether he had received that exhibit. He answered that as it was addressed to Rahaz Sdn Bhd for his attention then he said that he should have received this letter. He said that the letter in exh. "P70" stated that Rahaz Sdn Bhd had breached the terms contained in Fulcrum's letter of offer dated 27 September 1996 by concealing or omitting material facts in the application of the loan. It also said that the memorandum of charge of shares and the power of attorney to be executed by Rahaz Sdn Bhd in respect of the letter and Merbok Hilir shares were in contravention of the injunction dated 24 May 1996 obtained by Wan Dayang bte Wan Mahmud. As such, according to him, Fulcrum was unable to drawdown or disburse the facility until the said injunction had been discharged or evidence of the same had been forwarded to Fulcrum. According to him, the injunction had been exhibited and that can be seen in exh. "P68". He said that he was not personally served with a copy of the injunction in exh. "P68". He was asked whether he was aware of the terms of exh. "P68" and he replied that he was advised by Dato' Samsudin in regard to the terms of exh. "P68" and he said that he could remember the date when the said Dato' had advised him. He was asked to give an approximate date and he said that probably it was sometime in late May or early June of 1996. He said that he is the beneficial owner of his two shares in Rahaz Sdn Bhd. He said that the injunction did not concern his two shares in Rahaz Sdn Bhd. He was asked whether he discussed the issue of injunction with Dato' Samsudin before he signed the letter of offer dated 27 September 1996 and he answered in the positive in that he did voice his concern. He said that his concern was in respect of the Merbok Hilir shares. He was asked as to why he signed the letter of offer and he replied that he did so because Dato' Samsudin told him that the matter was settled. He was asked whether he believed Dato' Samsudin and he replied in the positive. He was again asked as to why he believed Dato' Samsudin and he replied:

Since this matter is between Dato' Samsudin and his ex wife, I believe that Dato' Samsudin is fully aware of this matter.

He was then asked:

What did you do when you receive P70?

and he replied:

After reading P70, I would have shown it to Dato' Samsudin if he's in town or faxed it to him in South Africa if he is not in town.

The re-examination of Azahari continued along these lines:

Q: What did Fulcrum require from Rahaz by the terms of P70?

A: To effect the drawdown of the facility, Fulcrum required evidence that the injunction has been discharged.

Q: What is the date of this letter (P70)?

A: 7 October 1996.

Q: Was the loan facility subsequently drawdown?

A: Yes, upon the lifting of the injunction.

Q: When was the loan drawdown?

A: 9 October 1996.

In regard to p. 105 of bundle "A", Azahari was asked:

When was the loan drawdown?

and he answered that it was on 10 October 1996. The re-examination of Azahari continued further:

Q: Were the security documents executed by Rahaz accepted by Fulcrum?

A: Yes.

Q: Was this subsequent to the letter in P70?

A: Yes.

Q: What does the drawdown of the loan and the acceptance of the security document mean to you?

A: That the injunction against the shares have been lifted.

Q: Did you at any time during the signing of the letter of offer and subsequently after that believe that the suit between Wan Dayang bte Wan Mahmud and Dato' Samsudin have not been settled?

A: No.

With that, the re-examination of Azahari ended.

I have considered the evidence of Azahari in its entirety. His evidence merely strengthened the case for the plaintiffs in the Samsudin Action and the Rahaz Action. Azahari's testimony can be summarised, *inter alia*, in the following terms, namely that:

(1) the full sum of RM14,344,512 must be paid by the defendants in order to entitle them to an extension of time of six (6) months;

(2) the defendants knew, at all times, and understood that the sum of RM13,719,512 represented the interest portion of the loan;

(3) the defendants knew and understood that the plaintiffs were only prepared to consider granting an extension of part of the loan amounting to RM62.5 million and that this was consistent with s. 4.06 of the facility agreement as seen in exh. "P5" which gave the plaintiffs the sole discretion to extend the whole or only part of the facility;

(4) the imposition of RM625,000 as a 1% extension fee on the RM62.5 million was permitted by s. 4.06 of the facility agreement in exh. "P5" and s. 7.02 thereof;

(5) the loan facility was made up of two tranches of RM62.5 million and RM13,719,512, and that the total sums of both these figures came up to RM76,219,512;

(6) the sum of RM13,719,512 was disbursed upfront to the defendants as upfront interest payment for the entire loan period;

(7) the facility agreement clearly stated that the interest was to be computed on the full facility of RM76,219,512 and not on the sum of RM62.5 million;

(8) the statements of accounts which were sent to Rahaz Sdn Bhd and Dato' Samsudin from 31 October 1996 to 31 December 1997 as seen in exhs. "P19A" to "P19L" and "P30", "P31A", and "P31B" were correct;

(9) the statements of accounts were considered correct unless Fulcrum was notified of any discrepancy within 14 days upon receipt and on this point it must be borne in mind that s. 11.15 of the facility agreement provides that a statement by the lender to the borrower by any of its officers shall be conclusive evidence of the indebtedness so stated and that such amount is in fact due and payable and binding on the borrower save and except for any manifest error or where fraud is proven;

(10) the correctness and accuracy of these statements of accounts were beyond question;

(11) the exhibit marked as "P67" was correct and it was consistent with exh. "P31B" as seen at p. 122 of bundle "A" save and except further interests computed from 1 January 1998 to 31 October 2000 and after taking into account the various payments received by Fulcrum from the proceeds of sale of the SMG shares in the Johannesburg stock exchange and the dividends received in regard to the Merbok shares; and

(12) his trust and confidence in the words of Dato' Samsudin were misplaced as the said Dato' had recklessly exposed him to a contempt proceeding in relation to the Syariah High Court proceedings as seen in exh. "P68".

In my judgment, the plaintiffs have proved, on the balance of probabilities, that they never agreed to extend or roll over the facility for a further period of six months until 9 April 1998. It was also part and parcel of my judgment that the plaintiffs have proved, on the balance of probabilities, that the conditions precedent had not been met before they could even consider granting the extension. I took into account of Francis Yong's disgust at the way in which Dato' Samsudin was adept in putting words which were never agreed upon. It was crystal clear that all the employees of Fulcrum had no authority to extend the loan. Even Azahari confirmed, under cross-examination, that from the tenor of exh. "P21" as seen at p. 124 of bundle "A" that the authority to grant the approval for the extension rested with the directors of Fulcrum. There was evidence that Francis Yong was not even a director of Fulcrum.

It was suggested that there was a telephone conversation between an M.D. (Managing Director) of Fulcrum and Dato' Samsudin on 17 November 1997 where it was said that an agreement to an extension of the loan was reached. But Azahari, under cross-examination, confirmed that he did not know who the M.D. (Managing Director) of Fulcrum was. Furthermore, that very suggestion was not even pleaded and to confound the matter further Dato' Samsudin did not even attend court on the scheduled dates of hearing and so he did not take the stand in the witness box to testify and be cross-examined. Mr. M. Pathmanathan criticised the conduct of Dato' Samsudin for not attending court and, consequently, for refusing to take the

stand. Mr. M. Pathmanathan also criticised Dato' Samsudin for giving priority to the "Granmom" who had fallen from the wheelchair in Johannesburg.

There was evidence that on 4 December 1997 (see exh. "P28"), the plaintiffs wrote to Rahaz Sdn Bhd giving them an ultimatum of seven days to come up with an acceptable proposal. The defendants played possum and did not respond at all. On the expiry of the seven days, the external auditors of the plaintiffs swung into action. Messrs Salleh Leong Azlan & Co who was the plaintiffs' external auditors swiftly issued a certificate of an event of default as seen in exh. "P29". The evidence was certainly overwhelming and it compelled me to the conclusion that there was no agreement reached between the plaintiffs and the defendants to roll over the term loan facility dated 9 October 1996 for a further period of six months until 9 April 1998.

Conclusion

Now, at the time of writing this long judgment, I had occasion to reflect and I must say that my decision that was pronounced in open court on 6 December 2000 as reproduced in the early part of this judgment must stand as they were based on the available evidence. I do not propose to regurgitate the facts once again. I hereby confirmed my decision that was delivered in open court on 6 December 2000. I agreed wholeheartedly with the excellent submissions of Mr. M. Pathmanathan that were made on 4 December 2000 and 5 December 2000 and which were reproduced in the early part of this judgment. These excellent submissions of Mr. M. Pathmanathan were made based entirely on the available evidence and nothing else. The evidence as adduced weighed heavily against the defendant and the interveners in the Samsudin Action and against the defendant in the Rahaz Action.

Mr. M. Pathmanathan rightly invited this court to draw an adverse inference under s. 114(g) of the Evidence Act 1950 in regard to the conduct of Dato' Samsudin who, time and again, refused to attend court. Sarkar on *Evidence*, 13th edn, a 1990 reprint at p. 1049 carries the following salient write ups which would certainly be reflective of the conduct of Dato' Samsudin. There the learned authors of Sarkar on *Evidence* wrote:

> Presumptions are necessarily made against parties who having a knowledge of the facts in dispute will not subject themselves to examination, when a *prima facie* case is made against them, and when by their own evidence, they might have answered it (*Nawab Syed v. Amanee*, 19 WR 149 PC pp 150-51. See also *Sabbaji v. Shidappa*, 26 B 392 in which the circular order of the Bombay High Court dated 31st September, 1900 was referred). The Judicial Committee observed: '… Under such circumstances it is impossible to overlook the significance attaching to the refusal of the respondents and their son Jot Singh to enter the witness box. It raises a presumption against them' (*Durga v. Mathura*, 15 CWN 717, 721-22, 10 IC 963 PC).
>
> It is the bounden duty of a party personally knowing the whole circumstances to give evidence and to submit to cross-examination. Non-appearance as a witness would be the strongest possible circumstance to discredit the truth of his case (*Gurbakhsh v. Gurdial*, A 1927 PC 230, 32 CWN 119. In this case the question was whether a woman had given birth to a posthumous son to inherit her husband's property. She avoided a challenge to undergo medical examination on her husband's death to find

out advanced pregnancy and disappeared into a foreign State whence she emerged after a long time with a male child. She was present in court during the progress of the suit but did not go to the witness box).

The refusal of Dato' Samsudin to attend court on the scheduled dates can certainly be equated as a refusal not to go to the witness box. This would be the reasonable inference to arrive at bearing in mind that the trial had extended to twenty six (26) long arduous days. This was my judgment and I so hold accordingly.

Having weighed the evidence in its correct perspective and, on the balance of probabilities, it was my judgment that the preliminary issue as framed ought to be decided in the negative as reflected in my decision that was handed down on 6 December 2000. That was indeed a resolute decision.